Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

1988

Utah Power and Light Company v. City of Logan : Amicus Brief

Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
John T. Nielsen, James A. Holtkamp; Van Cott, Bagley, Cornwall, and McCarthy; W. Scott Barrett; City of Logan; Attorneys for Plaintiff.
Samual F. Chamberlain; Utah Power and Light Co.; W. Cullen Battle, Douglas J. Payne; Fabian and Clendenin; Attorneys for Defendant.

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH POWER & LIGHT COMPANY, A Corporation, Defendant and Appellant, vs. CITY OF LOGAN A Municipal Corporation, Plaintiff and Respondent.	BRIEF OF AMICUS CURIAE UTAH ASSOCIATED MUNICIPAL POWER SYSTEMS Civil No. 880411

On appeal from a judgment and order entered by Judge VeNoy Christofferson in the First Judicial District Court for Cache County, Utah

John T. Nielsen, A2408
James A. Holtkamp, A1533
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Attorney for Amicus Curiae

W. Scott Barrett, A0228
CITY OF LOGAN
255 North Main Street
Logan, Utah 84321
Telephone: (801) 752-3060

Attorney for Plaintiff
and Respondent

Samuel F. Chamberlain, A0611
UTAH POWER & LIGHT CO.
1407 West North Temple
Salt Lake City, Utah 84110

W. Cullen Battle, A0246
Douglas J. Payne, A4113
FABIAN & CLENDENIN
A Professional Corporation
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

Attorneys for Defendant
and Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH POWER & LIGHT COMPANY, A Corporation, Defendant and Appellant, vs. CITY OF LOGAN A Municipal Corporation, Plaintiff and Respondent.	)	BRIEF OF AMICUS CURIAE UTAH ASSOCIATED MUNICIPAL POWER SYSTEMS Civil No. 880411

On appeal from a judgment and order entered by Judge VeNoy Christofferson in the First Judicial District Court for Cache County, Utah

John T. Nielsen, A2408
James A. Holtkamp, A1533
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Attorney for Amicus Curiae

W. Scott Barrett, A0228
CITY OF LOGAN
255 North Main Street
Logan, Utah 84321
Telephone: (801) 752-3060

Attorney for Plaintiff and Respondent

Samuel F. Chamberlain, A0611
UTAH POWER & LIGHT CO.
1407 West North Temple
Salt Lake City, Utah 84110

W. Cullen Battle, A0246
Douglas J. Payne, A4113
FABIAN & CLENDENIN
A Professional Corporation
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

Attorneys for Defendant and Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction to hear the subject appeal pursuant to Utah Code Ann. §78-2-2(3)(j) (Supp. 1988). This Brief Amicus Curiae is filed pursuant to the provisions of Rule 25, Rules of the Utah Supreme Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Would adoption of Utah Power & Light Company's (UP&L's) interpretation of §10-2-424, Utah Code Ann., 1953 as amended, and its theory as to the measure of damages foster anti-competitive effects and further skew the competitive imbalance between UP&L and municipal power systems.

2. Was §10-2-424, Utah Code Ann., 1953 as amended, intended by the Utah State Legislature to be a condemnation statute and does it require a theory of compensation applying traditional eminent domain measures of damage?

CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Const. Art. XI, Section 5(b):

(Cities have power) to furnish all local public services, to purchase, hire, construct, own, maintain and operate, or lease, public utilities local in extent and use; to acquire by condemnation, or otherwise, necessary for any such purposes, subject to restrictions imposed by general law for protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.

Utah Code Ann. Section 10-20-424:

Whenever the electric consumers of the area being annexed are receiving electric utility services from sources other than the annexing municipality, the municipality may not, without the consent of the electric utility, furnish its electric utility services to the electric consumers until the municipality has reimbursed the electric utility company which previously provided the services for the fair market value of those facilities dedicated to provide service to the annexed area. If the annexing municipality and the electric utility cannot agree on the fair market value, it shall be determined by the state court having jurisdiction.

Utah Code Ann. Section 10-7-4:

The board of commissioners, city council or board of trustees of any city or town may acquire, purchase or lease all or any part of any water, waterworks system, water supply or property connected therewith, and whenever the governing body of a city or town shall deem it necessary for the public good such city or town may being condemnation proceedings to acquire the same; provided, that if within thirty days after the passage and publication of a resolution or ordinance for the purchase or lease or condemnation herein provided for one-third or the resident taxpayers of the city or town, as shown by the assessment roll, shall protest against the purchase, lease or condemnation proceedings contemplated, such proposed purchase, lease or condemnation shall be referred to a special election, and if confirmed by a majority vote thereat, shall take effect; otherwise it shall be void. In all condemnation proceedings the value of land affected by the taking must be considered in connection with the water or water rights taken for the purpose of supplying the city or town or the inhabitants thereof with water.

Utah Code Ann. Section 78-34-1:

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

(1)

(2)

(3) public buildings and grounds for the use of any county, city or incorporated town, or board of education; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county or city or incorporated town, or for the draining of any county, city or incorporated town; the raising of the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys; and all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof.

(4)

(5)

(6)

(7)

(8) telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.

STATEMENT OF THE CASE

1 Nature of the case, course of the proceeding and the disposition below.

On April 17, 1989, Utah Associated Municipal Power Systems (UAMPS) petitioned this Court for Leave to File an Amicus Curiae Brief. The Motion was predicated upon the fact that this Court should be apprised of the concerns expressed by the Federal Energy Regulator respecting certain anti-competitive practices by UP&L and the effect that a decision by this Court adopting UP&L's theory of damages would have on the ability of municipal power agencies to compete with UP&L respecting the servicing of newly annexed residents with electrical utility services. Additionally, the Motion also sought to address some of the issues respecting the measure of damages which were not addressed in the Logan City Brief.

On April 18, 1989 this Court granted UAMPS' Motion and the time for filing of the Amicus Brief was subsequently enlarged to and including May 25, 1989.

UAMPS adopts the statement of the case as set forth in the Brief of Logan City but recognizes the fact that UP&L disputes Logan's view that ownership of UP&L distribution facilities are not a central issue in the case. UAMPS takes no position with respect to which is the correct interpretation.

2 Statement of Facts

UAMPS adopts Logans statement of facts as set forth in its brief.

SUMMARY OF ARGUMENTS

1. For this Court to adopt UP&L's interpretations of §10-2-424, Utah Code Ann., 1953 as amended, (hereinafter §424) and its theories of the measure of damages, would be

anti-competitive and, frustrate or foreclose the ability of municipalities to serve annexed residents.

2. Section 424 was never intended by the Utah State Legislature as a condemnation statute. It was only intended to fairly compensate a utility previously servicing annexed areas for its "dedicated facilities" which were providing service to the annexed areas. UP&L's theory of damages either as to its measure of market value or in the nature of condemnation are contrary to legislative intent and not required by §424.

ARGUMENT

I. TO ADOPT UTAH POWER & LIGHT'S INTERPRETATION OF § 10-2-424 AND ITS THEORY OF THE MEASURE OF DAMAGES WOULD BE ANTI-COMPETITIVE AND WOULD FRUSTRATE OR FORECLOSE THE ABILITY OF MUNICIPALITIES TO SERVE ANNEXED RESIDENTS.

UAMPS' members include Beaver, Blanding, Bountiful, Brigham City, Enterprise, Ephraim, Fairview, Fillmore, Beaver Light & Power, Holden, Hurricane, Hyrum, Kanosh, Kaysville, Lehi, Meadow, Monroe, Morgan, Mt. Pleasant, Murray, Oak City, Parowan, Payson, Price, Santa Clara, St. George, Spring City, Springville, Strawberry Electric Service District, and

Washington. UAMPS' members have cooperatively organized in order to secure reliable, economic sources of electric power for their residents.

As may be expected, the relationship between UP&L and the public power agencies in Utah, including the members of UAMPS has not always been salubrious. UAMPS' members firmly believe that local control and accountability assures better and more economic service. There is also considerable pride in the autonomy represented by municipally owned and operated utilities.

Municipal power systems serve an important function by providing "yardstick" competition with investor-owned utilities. Although the Utah Public Service Commission is intended to be a substitute for free market competition, there is still the need for benchmarks against which the reasonableness of investor owned utility rates may be measured.

The residents of areas annexed by municipalities which own and operate their own electric distribution systems should have the right to consider, among other things, the advantages available of service from the municipal utilities. The position advanced by UP&L in this case would tend to restrict or eliminate the choices the citizens may have by making it much more difficult for the annexing municipality to provide those services.

The competitive arena in Utah has historically been tilted away from the public power systems in favor of the investor-owned utilities. As an example, the municipal systems are transmission dependent, meaning that they rely exclusively upon UP&L transmission system for the supply of energy to the municipality. In addition, it is very expensive for a municipality to acquire, construct or operate its own electric distribution system, particularly where UP&L has a franchise right within the municipal limits.

An example of the difficulty that a municipality faces in taking over a distribution system is that of Cedar City. Notwithstanding popular support for municipal operation of the electric system, Cedar City's only realistic alternative is the construction and operation of an expensive duplicate system within the city limits. In fact, very few municipalities have been able to convert their systems from investor-owned to municipal systems in the last decade. The only ones that have successfully consummated such a transition are Kanab, Santa Clara, and Washington.

Another factor which tilts the competitive balance away from public power in Utah has been the long-standing policies and practices of UP&L respecting its relationships with public power entities. In conditionally granting approval of the merger of UP&L and PacifiCorp, the Federal Energy

Regulatory Commission ("FERC") made a number of findings with regard to the historical anti-competitive behavior of UP&L. Utah Power & Light Company, PacifiCorp, PC/UP&L Merging Corporation, Opinion No. 318, 45 FERC ¶ 61095 (Oct. 26, 1988), modified, Opinion No. 318-A 47 FERC ¶ 61 (May 12, 1989) (hereinafter "Opinion No. 318"). A copy of the FERC opinion is attached hereto as Appendix A.

In Opinion No. 318, the FERC affirmed the findings of the FERC Administrative Law Judge with regard to UP&L's anti-competitive behavior both before and after the merger. The FERC expressly found that the proposed merger "would likely substantially lessen competition and tend to create a monopoly." (Opinion No. 318 at p. 14.) One of the findings made by the FERC was that UP&L had "consistently refused to permit the wheeling of low-cost power across its system in order to use its strategically located bottleneck to extract monopoly prices." (Opinion No. 318 at p. 33.)

The FERC imposed certain conditions which, if satisfied by the merged company, would ameliorate such anti-competitive behavior. These conditions include certain obligations to provide wheeling to transmission-dependent utilities such as the members of UAMPS.

The relevance of the FERC Opinion in this proceeding is simply to indicate that UP&L has historically occupied a dominant position in the electric power marketplace in the State of Utah. The District Court made no findings of anti-competitive behavior in connection with the issue before it, and UAMPS does not suggest that this Court find that UP&L has engaged in such anti-competitive behavior. However, it is important for this Court to understand that, as a matter of public policy, the playing field on which UP&L and the municipal power systems compete should not be so tilted towards the investor-owned utility that the already competitive and economic advantage are exacerbated.

The restrictions on municipal growth which would result from the position advocated by UP&L would create a further imbalance in favor of UP&L. The position advocated by Logan, on the other hand, would help ensure that the electric consumers within newly annexed areas are able to take advantage of municipal electric service to the extent that the annexing municipality is able to provide such service. Once within the municipal boundaries, those residents then share with the other residents of the municipality the right to exercise through the ballot box control over municipal decisions and policies regarding utility services to the residents.

It is natural therefore, that upon occasion of an annexation of a territory to a municipality that those annexed will desire to receive local services, particularly if they are less expensive and can guarantee local control as to rates and service. The right to be served, and reciprocally the right to serve, should not be abrogated nor impeded by artificially high damage theories.

If the practical effect of adopting UP&L's damage measure is to foreclose the ability of an annexed resident to be served by an annexing municipality, or conversely, to make it financially impossible for the annexing municipality to serve its new residents, then not only may it offend the constitution of Utah but would foster the anti-competitive effects identified by the FERC.

In the case before the Court Logan has offered $117,000 to compensate UP&L for the value of its local facilities. UP&L counters, arguing that the measure of damages equates to $434,987 dollars ($343,568 according to the alternative condemnation evaluation). The territory annexed to Logan included fifty five customers who generated a total of $77,000 gross billings per year.

Logan argues that adopting UP&L's measure of damages would amount to a practical foreclosure of its constitutional right to service its customers pursuant to Article XI, §5(b) Utah Constitution. UAMPS would submit that even adopting UP&L's alternate and less expensive damage measure may have the same effect. Testimony in the District Court established that

Logan would never receive a net return on its investment and that such a price would render Logan's ability to service such customers untenable economically. (TR.100-101) Indeed Judge Christofferson in his Memorandum Decision ruled:

> "An award of such compensation would make it economically unfeasable for any municipality to supply the electrical utilities to customers in the annexed area. This effectively denies them their constitutional rights to supply electric services to those that may become citizens of the municipality by means of annexation."

UAMPS believes that Logan's constitutional argument is sound but would suggest that this Court be additionally sensitive to the public policy issues that were so much a part of the hearings before the FERC.

UAMPS and its members submit that UP&L's position in this case is merely a continuation of its long standing practice of frustrating competition from other utilities. By conjuring up every possible theory of damages UP&L is attempting to foreclose, or at the very least discourage, the right of a municipal utility to provide electric service to the residents of the municipalities.

Public power systems are at the very heart of Utah's tradition of local control and serve as a useful and necessary element of competition in an otherwise monopolistic market place. Municipal power systems have survived despite financial obstacles and historic anti-competitive practices of UP&L.

Additionally, this case arises at a time when the recent merger will provide huge economic advantages to UP&L . Notwithstanding the terms and conditions imposed by the FERC, municipal utilities and other public power agencies will be hard-pressed to remain competitive in such a climate all to the advantage of UP&L.

UAMPS urges this Court to be mindful of the far reaching effect that an excessive measure of damage will have not just to Logan City but to the public power systems in Utah. Such a ruling would frustrate the vitality so necessary for public power systems to continue to serve their customers reliably and economically.

Logan has made a reasonable offer to compensate UP&L for its facilities which have heretofore serviced the annexed territory. The District Court agreed and rejected the UP&L position. Its position to compensate only the dedicated local facilities and a pro rata amount for partially dedicated facilities is consistant with legislative intent and is fair in all respects. Logan's position with respect to the measure of damages is not only reasonable but allows the city to service and the customers to be serviced and enhances market place competition.

II. §10-2-424, UTAH CODE ANN., 1953 AS AMENDED, IS NOT, NOR WAS IT EVER INTENDED, AS A CONDEMNATION STATUTE NOR DOES IT REQUIRE COMPENSATION APPLYING TRADITIONAL EMINENT DOMAIN THEORY.

In its brief, Logan concluded that it would not attempt to "refute the greater part of the Utah Power & Light Brief which is directed toward the measure of damages in condemnation." While UAMPS agrees with Logan that this is not a condemnation case it nonetheless feels it necessary to address the measure of damage theory suggested by UP&L.

It is, after all, an economic reality that in adopting a measure of damages as suggested by UP&L the right of annexed customers to be serviced and the ability of a municipality to so service its residents will likely be foreclosed.

UAMPS takes no issue with UP&L's position that it should be fairly compensated. However, the determination of what is "just compensation" is not, in this case, determined by the traditional eminent domain measures of damages, nor do the damages provisions of §424 themselves offend the constitution.

The issue of condemnation of electric systems was brought to a head in 1981 when several Southern Utah cities and towns brought suit to condemn the assets of CP National Corporation in Southwest Utah. CP National was a public utility which furnished electricity to Iron, Washington and Kane Counties.

On appeal of the trial court's granting CP National and UP&L's Motion to Dismiss this Court addressed the issue of the "whether any municipality possessed the authority to condemn an existing and operating power system by eminent domain. CP National Corp. v. Public Service Commission, 638 P.2d 519 (Utah 1981)

In discussing sections of the Utah Code which confer the right of condemnation and define the powers of municipalities this Court concluded that:

> "No. . . express statutory authority exists for municipalities to condemn a power system." at 523

Furthermore, the Court construed the relevant portions of §78-34-1 Utah Code Ann., 1953 as authorizing the condemnation of real property not already constructed facilities. In so concluding the Court held:

> "The taking of an ongoing public utility business is more than the taking of real or even tangible personal properties and is therefore. . . not contemplated within the meaning of §78-34-1(3)." at 523

The Court also limited the provisions of §78-34-1(8) Utah Code Ann., 1953, which authorize the condemnation of "electric light and electric power lines and sites for electric light and power plants," to the lines and sites for a power plant.

Having thus concluded that the exercise of eminent domain was not available to municipalities to authorize the condemnation of operating electric power systems, the Court finalized its conclusions with a statement important to the considerations herein presented:

> "Had the legislature intended to grant more, it is reasonable that it would have done so expressly in §78-34-1(8) or elsewhere as it did in the case of water works systems in §10-7-4." at 524

This statement is a fitting preface in analyzing what was intended by the Utah Legislature when it enacted §424. The need for just such legislative direction as to the respective rights and obligations of an annexing municipality and public utilities already servicing those annexed areas was persuasively urged in a 1982 law review article. CP National Corp.. v. Public Service Commission: The Jurisdictional Ambiguity Surrounding Municipal Systems, 1982 Utah L. Rev. 913.

Accordingly, the Utah Legislature took up the challenge in 1983. Instead of amending the general eminent domain statute, the Legislature dealt with the subject in Title 10, chapter 2 of the Code which deals generally with the extension of corporate limits. Had the legislature intended otherwise, §78-34-1 could easily have been amended to clarify the problem identified by the Court in CP National, Supra. It would have been equally as logical for the legislature to have added to or amended Title 10, Chapter 7 Article 3 of the Code to specifically provide for "condemnation" had that been their intent.

The floor debate, referenced extensively by both UP&L

and Logan in their respective Briefs is indicative of legislative intent. In the 1985 Senate debates on the amendments to §424 an interesting dialogue is engaged in by the sponsor, Senator Sowards and Senators Bangerter, Matheson, Hillyard, Barton and Bunnell. A portion of that dialogue was referenced in Logan's Brief but reproduced herein for total context:

> Senator Matheson:
> Then Senator, then suppose now that whoever the utility you're going to purchase from don't want to sell. Now this bill gives you the right to negotiate with them for an arms-length sale, I suppose. But does it give you the right of condemn, er, of eminent domain. It ought to just automatically take that over without a court proceeding if they won't negotiate in good faith.
>
> Senator Bangerter:
> I think on the eminent domain system, I had better get some help. What about some eminent domain, counselor?
>
> Senator Hillyard:
> I expect that they probably could file an eminent domain for a public right. I would have to look up that specific question, but, cities, number one, do have the power of eminent domain, but its only for what they do, the purpose, right, uh, their public right. But if they do, then they pay what the court or the jury determines to be a fair market value. And I don't think there is any different way of negotiating what an arbitrator would decide.
>
> Senator Matheson:
> That's correct. But under this bill, now suppose they don't want to negotiate like you've said here for fair market value and they don't want to sell. Now are you going to let them, under this bill, require that you give it to them? Is that

a back door approach to eminent domain, is the question I'm asking?

Senator Hillyard:
Well, I don't think its a back door approach, I think that the city has the power of eminent domain. How they exercise it is the question. . .

Senator Matheson:
Not without going to court.

Senator Hillyard:
That's right.

Senator Matheson:
Are you granting that power to them now to take this without going to court under the process of eminent domain?

Senator Hillyard:
No. No.

Senator Matheson:
If they don't want to sell?

Unidentified:
I think you would be back into court if you can't agree to a figure on eminent domain.

Senator Bangerter:
Mr. President. I think this bill, uh, in answer to Senator Matheson, I think that citizens as they annex, they have the constitutional right to have the same kind of services because they pay the same kind of taxes. And whether in the court process that that has to happen through eminent domain, I think that, my opinion, would be that that would be up to the courts.

President:
Senator Barton.

Senator Barton:
I think on page 2, line 6, the question is stated. While starting on line 5, it says "if the annexing municipality and the electric utility cannot agree on the fair market

reimbursement value, it shall be determined by the state court having jurisdiction." So that doesn't even speak to eminent domain, uh, the court will decide.

Senator Bangerter:
That's correct. That's the way I understand it, too.

Senator Bunnell:
I think that what this says is if you annex and you're getting power from UP&L, they have a right to serve you until the city reimburses you for the fair value, I mean reimburses the utility. Now, if you can't agree on the fair value, then they have to go to court, but if the city offers them like $50.000.00, if that's the fair value, they have to take it. They would have to prove it in court if they couldn't agree. So the penalty is that these people will stay on UP&L until the deal is made. On the other side, it forces the utility and the municipality to make a deal. If they don't, they have to go to court.

Senator Bangerter:
I think that's correct.

While there appears to be some confusion as to the means of compensation, Senator Barton nicely summerizes the purpose and intent of the bill.

Logan is absolutely correct in its assertion that §424 was enacted in part to encourage "good faith negotiation." Senator Sowards, in his final statement before the vote to reconsider action of the bill in 1983 stated in response to a similar observation from Senator Bangerter:

"*That's why were passing the bill, to get away* from litigation."

There is never a hint that the legislative scheme was intended to generate the "trappings" of a full blown condemnation proceeding. It was simply a good faith attempt to find a fair method of balancing the right of annexing municipalities to serve their new residents and to "fairly, not extravagantly," reimburse the previously servicing utility. It is an attempt, admittedly not a perfect one, to encourage settlement and to avoid the acrimony that almost always attends condemnation litigation.

UAMPS concedes that UP&L is entitled to compensation for its "facilities dedicated to provide service to annexed areas." The basis for the measure of damage, however, is defined by the language of the bill itself. Again the legislative hearings are an indication of what was intended. Senator Sowards, the original sponsor of the 1983 version of §424, explained that the purpose of the bill "is to provide that electric utilities are fairly paid for their facilities and equipment in areas that they are servicing when they are annexed by a municipality with a power system of its own."

Additionally, it is obvious from a reading of the legislative hearings and particularly of Senator Sowards' testimony, that he was sponsoring House Bill 354 (the eventual §424) in the Senate on behalf of UP&L and was being advised by counsel for UP&L. It must thus be assumed that the sponsor, with the concurrence of the bills major proponent, were comfortable with the language of their legislative initiative.

Although §424 was further amended to remove restrictions relative to existing franchise rights, there is no suggestion in any of the hearings or the later amendments that compensation was to be paid for anything other than "facilities and equipment." UP&L now argues that §424 requires compensation for "severance damage, going concern value and the value of its franchise rights." It cites for authority numerous cases which it asserts support its position respecting damages. Although, these cases involve municipal annexation, each case involves the application of specific condemnation statutes setting forth the method by which the city attempted to take over the property of a private utility. Relying upon such case authority, UP&L argues that the only logical and constitutional interpretation of §424 is that it requires compensation for not only its local facilities, but a share of UP&L system assets, including generation, substations, franchising and going concern values. It presents a neat, seemingly definitive percentage calculation as to the portion of its system "dedicated" to the servicing of the fifty five annexed residents and calculates the fair market of all such damage.

Although not conceding that this matter involves condemnation, prominent commentators have discussed the difficulty in determining "standards of compensation in utility condemnation." Quoting case law it has been said:

> "The standard of compensation in utility condemnation is an extremely vague one, and although many tests are considered none seems to be controlling. No rigid measure can be prescribed for the determination of "just compensation under all circumstances and in all cases." No hard fast rule can be laid down that will cover every case nor fix in advance the limit of the matters that may be taken into consideration in any particular case. Various tests have been employed, alone and in combination. The usual method of fixing the value of property for taking is by ascertaining market value. There is hardly a market, in the usual sense, for a public utility, particularly the regulated utility. We must, therefore, turn to other tests of value. <u>What we use is largely a matter of judgment and circumstance</u>. (emphasis added) 4A <u>Nichols, The Law of Eminent Domain</u>, §15.4(1), citing, <u>Onondaga County Water Authority v. New York Water Service Corp.</u> 285 App. Div. 655, 139 N.Y.S. 2d 255

UAMPS submits that this is precisely the test that should be applied herein and in the future when §424 becomes applicable. Because of the unique circumstances that exist in Utah respecting the economic and competitive advantages historically enjoyed by UP&L and now even more evidenced by the recent merger, this Court should judge this appeal in view of those realities.

The District Court in this case has made an award which fairly compensates UP&L for its "dedicated and partially dedicated transmission facilities. UP&L no longer will have the beneficial use of these facilities (whether it retains title or not) and it should be compensated.

The valuation of these facilities is reasonably susceptible to objective determination. It is difficult to understand, however, how the loss of fifty-five residential customers will have an adverse economic impact on UP&L's system, particularly where many times that number of customers are added to the system each week. With the huge economic and competitive advantages enjoyed by UP&L it should not be granted "windfall damages" at the expense of the few small municipalities who seek only to service newly acquired residents desiring the municipal utility services.

CONCLUSION

UAMPS joins with Logan City in submitting that the judgment of the District Court be affirmed.

UAMPS has suggested herein that the over-riding public policy concerns expressed by the Federal Energy Regulatory Commission should be given great deference by this Court in reviewing this matter on appeal. UP&L has advanced a theory of damages which if granted will substantially interfere with the rights of municipalities to service its annexed customers with electric utility services. Furthermore, while the legislature was certainly concerned about fairness in reimbursement of a utility which had previously serviced an annexed territory, it was also concerned about fairness to the municipality with the hope that when such annexations occur, reimbursement could be facilitated through a reasonable negotiation process. The Legislature could never have intended a result which would so substantially enhance the already competitive market advantage enjoyed by UP&L.

It is therefore respectively submitted that the award of reimbursement to UP&L by the District Court was reasonable and that the same should be affirmed by this Court.

DATED this 25the day of May, 1989.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By ______________________

John T. Nielsen
Attorneys for Amicus Curiae
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the within and foregoing BRIEF AMICUS CURIAE UTAH ASSOCIATED MUNICIPAL POWER SYSTEMS to be mailed, postage prepaid, this 25the day of May, 1989, to the following:

Samuel F. Chamberlain, A0611
UTAH POWER & LIGHT CO.
1407 West North Temple
Salt Lake City, Utah 84110

W. Cullen Battle, A0246
Douglas J. Payne, A4113
FABIAN & CLENDENIN
A Professional Corporation
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

Attorneys for Defendant and Appellant

W. Scott Barrett, A0228
CITY OF LOGAN
255 North Main Street
Logan, Utah 84321
Telephone: (801) 752-3060

Attorney for Plaintiff and Respondent

4499N
052589

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 318

Utah Power & Light Company)
PacifiCorp) Docket No. EC88-2-000
PC/UP&L Merging Corporation)

OPINION AND ORDER AFFIRMING IN PART, MODIFYING IN PART, AND REVERSING IN PART INITIAL DECISION AND CONDITIONALLY APPROVING MERGER

Issued: October 26, 1988

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Utah Power & Light Company PacifiCorp PC/UP&L Merging Corporation	)))	Docket No. EC88-2-000

OPINION NO. 318

APPEARANCES

Arnold H. Quint, Richard W. Goldman, Evans B. Brasfield and Daniel A. Carrell for Utah Power & Light Company, Pacificorp and PC/UP&L Merging Corporation

Henlen J. Edwards and Sidney G. Baucom for Utah Power & Light Company

George M. Galloway for PacifiCorp and PC/UP&L Merging Corporation

J. Patrick Berry and Charles M. Darling IV, for AMAX Magnesium Corporation

Jeffrey T. Sprung and Joseph C. Bell for Citizens Energy Corporation

Donald R. Allen, John P. Williams, Leslie P. Kent and Gary A. Dodge for Colorado River Energy Distributors Association

Lynn W. Mitton for Deseret Generation & Transmission Corporation

Jade Alice Eaton, David B. Raskin and J.A. Bouknight, Jr., for Idaho Power Company and Montana Power Company

P.L. Jauregui for Idaho Power Company

Daniel O. Flanagan for Montana Power Company

J. Cathy Fogel for Mid-West Electric Consumers Association

Peter J.P. Brickfield, Jill M. Barker and Daniel C. Kaufman for Nucor Steel

Judith H. Bearzi, Truman P. Price and R. Michael Austin for Public Power Council

Channing D. Strother, Jr., and Joshua L. Menter for Sierra Pacific Power Company

Richard M. Sharp, Randolph Lee Elliott and Timothy K. Shuba for Utah Associated Municipal Power Systems and Washington City, Utah

Scott Hempling for United Mine Workers of America, Environmental Action, Salt Lake Citizens Congress, and Salt Lake Area Community Action Program

Michael Ginsberg for Utah Division of Public Utilities

Willam B. Bohling, Donald B. Holbrook, Calvin L. Rampton, Elizabeth M. Haslam and David B. Lee for Utility Shareholders Association of Utah

Robert E. Neate for The Washington Water Power Company

Daniel J. Wright for Arizona Public Service Company

Richard L. Hinckley for Nevada Power Company

Don Garber for San Diego Gas & Electric Company

Robert C. McDiarmid and Daniel I. Davidson the for National Rural Electric Cooperative Association, American Public Power Association, Mid-West Electrid Consumers Association, Inc. Great Lakes Electric Consumers Association, Northwest Public Power Association, Southwestern Power Resources Association, Southeastern Power Resources Committee and Idaho Cooperative Utilities Association

Michael D. Oldak for the National Rural Electric Cooperative Association

C. Stephen Angle, Joseph H. Long and Thomas J. Conley for the Staff of the Federal Energy Regulatory Commission

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Charles G. Stalon and Charles A. Trabandt.

Utah Power & Light Company	)	
PacifiCorp	)	Docket No. EC88-2-000
PC/UP&L Merging Corporation	)	

OPINION NO. 318

OPINION AND ORDER AFFIRMING IN PART, MODIFYING IN PART, AND REVERSING IN PART INITIAL DECISION AND CONDITIONALLY APPROVING MERGER

(Issued October 26, 1988)

I. Background

On October 5, 1987, Utah Power & Light (UP&L), PacifiCorp (PacifiCorp Maine) and PC/UP&L Merging Corporation (PacifiCorp Oregon) (collectively referred to as Applicants) filed a joint application under section 203 of the Federal Power Act (FPA) 1/ seeking approval of a proposed merger.

Pursuant to an agreement and plan of reorganization and merger (merger agreement), the Applicants propose to merge PacifiCorp Maine and UP&L into PacifiCorp Oregon (to be renamed PacifiCorp upon completion of the merger) with PacifiCorp Oregon to be the surviving corporation. 2/

A. The Parties to the Proposed Merger

1. Utah Power & Light Company

UP&L is engaged principally in the business of generating and selling electric energy in Utah, southeastern Idaho and southwestern Wyoming. UP&L's electric service area of approximately 90,000 square miles contains approximately 510,000 retail customers. UP&L serves Salt Lake City, West Valley, and Ogden, Utah and over 400 other cities and towns at retail and serves numerous municipalities and electric associations at

---

1/ 16 U.S.C. § 824b (1982).

2/ The merger agreement provides that the capital stock of UP&L and PacifiCorp Maine shall be converted into shares of the capital stock of PacifiCorp Oregon.

wholesale. The company also sells surplus power and energy to other utilities. The Applicants state that PacifiCorp Oregon will conduct the same general business when the transaction is consummated, under the assumed business name of Utah Power & Light Company.

UP&L's transmission system is comprised of 7,788 miles of transmission lines. The company utilizes its facilities generally to supply electric services within its service area and to sell electric energy at wholesale pursuant to contracts and rate schedules on file with the Commission. The company also uses its transmission lines to transmit electric energy in interstate commerce.

UP&L is interconnected by high-voltage transmission lines to 18 adjacent major power systems. UP&L is a member of the Northwest Power Pool and is a party to the Intercompany Pool Agreement with seven Northwest utilities. UP&L is also connected to other power pools within the region of the Western Systems Coordinating Council.

2. PacifiCorp Maine

PacifiCorp Maine is a diversified corporation doing business as Pacific Power & Light Company (PP&L). PP&L is engaged in generating and selling electric energy in California, Idaho, Montana, Oregon, Washington, and Wyoming. PP&L's electric service area of approximately 63,000 square miles contains approximately 670,000 retail customers. PP&L serves over 240 cities and towns at retail and wholesale. The company sells surplus power and energy to other utilities. The Applicants state that PacifiCorp Oregon will conduct the same general business when the transaction is consummated, under the assumed business name of Pacific Power & Light Company.

PP&L owns and operates approximately 20,600 miles of transmission lines and is interconnected with the systems of other utilities in California, Montana, Oregon, Washington, and Wyoming. PP&L is also a member of the Northwest Power Pool and is a party to the Intercompany Pool Agreement with seven Northwest utilities. It is interconnected with UP&L at UP&L's Naughton Plant near Kemmerer, Wyoming. PP&L sells electric energy at wholesale in interstate commerce and transmits electric energy in interstate commerce.

PacifiCorp Oregon

PacifiCorp Oregon was incorporated for the purpose of effectuating the proposed merger. Upon approval of the merger, PacifiCorp Oregon would provide electric service to more than 1,180,000 retail customers throughout California, Idaho, Monta-

Oregon, Utah, Washington, and Wyoming. Its electric service territory would aggregate approximately 153,000 square miles.

B. The Applicants Statement with Regard to the Public Interest

The Applicants state that the proposed merger will promote the public interest and benefit customers of UP&L and PP&L by integrating the electric utility properties now separately owned and operated. 3/ They argue that because PP&L is a winter-peaking utility and UP&L is a summer-peaking utility, the consolidation will provide opportunities for more efficient use of power resources. This, they assert, will enhance the reliability of service and postpone the need for costly addition of resources and will enhance prospects of wholesale power sales to the southwestern United States. 4/

The Applicants anticipate that the consolidation of resources and operations and the economies of scale derived from the merger will allow the elimination of overlapping functions and result in future operating savings. Future operating savings are also expected through the consolidation of inventories, increased flexibility in scheduling maintenance of generation plants, and shared services between the operation divisions. 5/

The Applicants further assert that the merger would present an opportunity for increased operation efficiencies by virtue of existing generating capacity, technical expertise and other resources. PP&L currently obtains approximately 30 percent of its power from hydroelectric generation and the remainder through coal-fired generation. UP&L currently generates 92 percent of its electricity at coal-fired plants and owns several coal properties. The Applicants expect that the availability of PP&L's surplus power may also enable the UP&L division to delay construction of a new power plant, thereby deferring, and possibly eliminating, costly construction expenditures. The Applicants also expect that the benefits to be obtained will help to stabilize rates and result in the development of a less expensive and more efficient electrical system. 6/

Finally, the Applicants state that PacifiCorp Oregon, as the surviving corporation, will be both larger and financially

---

3/ Joint Application for Authorization for a Merger, filed October 5, 1987 at 10-12.

4/ Id.

5/ Id.

6/ Id.

stronger than either company operating separately. Accordingly, the Applicants assert that the merged company will be in a stronger position to finance the acquisition or construction of facilities on more advantageous terms. 7/

C. State Proceedings

Proceedings have been conducted by the state commissions in Arizona, California, Montana, Oregon, Utah, Washington, and Wyoming. Each of these state commissions has granted approval of the proposed merger.

D. The Commission's Hearing Order

On December 12, 1987, the Commission set for expedited hearing various issues with regard to the proposed merger. 8/

7/ Id.

8/ Utah Power & Light Co., et al., 41 FERC ¶ 61,283 (1987). The following parties sought and were granted intervention in this proceeding: AMAX Magnesium Corporation (AMAX); Citizens Energy Corporation; Colorado River Energy Distributers Association (CREDA); Deseret Generation & Transmission Corporation (Deseret G&T); Idaho Power Company and Montana Power Company; National Rural Electric Cooperative Association, American Public Power Association, Mid-West Electric Consumers Association, Inc., Great Lakes Electric Consumers Association, Northwest Public Power Association, Southwestern Power Resources Association, Southeastern Power Resources Committee, and Idaho Cooperative Utilities Association (collectively referred to as NRECA/APPA, et al.); the Nucor Steel Division of Nucor Corporation (Nucor Steel); Public Power Council; Sierra Pacific Power Company (Sierra Pacific); Utah Associated Municipal Power Systems (UAMPS) and Washington City, Utah; United Mine Workers of America, International Union, Environmental Action, Salt Lake Citizens Congress and Salt Lake Area Community Program (collectively referred to as United Mine Workers, et al.); Utah Division of Public Utilities; Utility Shareholders Association of Utah (Shareholder Association); The Washington Water Power Company; Arizona Public Service Company; Nevada Power Company; San Diego Gas & Electric Company; Pacific Gas and Electric Company; Southern California Edison Company; South Dakota Public Utilities Commission; Montana Public Service Commission; the Public Service Commission of the State of Wyoming; Rogue Valley Fair (continued...)

These issues include the effect of the proposed merger on rates, the effect of the merger on the competitive situation, and the effect of the merger on the ability of this Commission and the various state commissions to regulate the merged entity.

We also set for hearing the issue of whether the merged companies will be capable of being operated economically and efficiently as a single entity, as well as the impact on the public interest of the merged entity not operating as a single entity to the extent such is found to be the case. 9/

E. The Judge's Initial Decision

On June 13, 1988, the presiding administrative law judge issued an Initial Decision finding that the Applicants have failed to show that the proposed merger is consistent with the public interest. 10/ The judge found that: (1) the Applicants have not demonstrated that the benefits of the merger would outweigh its costs; 11/ (2) the proposed merger would tend to substantially lessen competition and create a monopoly; 12/ and (3) the Applicants' proposed structure, ratemaking, and allocation methodologies would adversely affect the ability of this Commission and the state commissions to regulate the merged entity. 13/

8/(...continued)
Share; and the Public Utilities Commission of the State of California. On February 19, 1988, Pacific Gas and Electric Company filed a notice of withdrawal pursuant to Rule 216 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.216 (1988). Similarly, on February 22, 1988, Southern California Edison Company filed a notice of withdrawal.

9/ 41 FERC at 61,753.

10/ Utah Power & Light Co., et al., 43 FERC ¶ 63,030 (1988).

11/ Id. at 65,335.

12/ Id. at 65,359.

13/ Id. In addition to the findings of fact set forth in the text of the Initial Decision, the judge set forth ninety-one (91) "Further Findings of Fact and Conclusions of Law." 43 FERC at 65,354-59. Unless specifically referred to in this opinion, no inference should be drawn that we either affirm or reverse such find

The judge also found that the various conditions proposed by the parties would not render the merger consistent with the public interest. 14/ Moreover, he found that the Commission lacks the authority to impose such conditions. Thus, the judge found that the application for approval of the merger should be denied.

F. Briefs on Exception to the Judge's Initial Decision

On June 27, 1988, Briefs on Exception to the judge's Initial Decision were filed by the following parties: the Applicants; trial staff; Utah Associated Municipal Power Systems; Sierra Pacific and Nevada Power Company; Washington Water Power Company; Nucor Steel; AMAX; the Public Service Commission of Wyoming; the Utah Division of Public Utilities; the Shareholder Association; and CREDA. 15/

In their Brief on Exceptions, the Applicants state that they except to almost every conclusion contained in the discussion section of the Initial Decision, as well as to almost every finding contained in the section of the Initial Decision entitled Further Findings of Fact and Conclusions of Law. 16/ They argue that the judge erred in the Initial Decision in applying an incorrect standard in determining whether the proposed merger is consistent with the public interest; in concluding that the merger is likely to lessen competition in any relevant market; in dismissing the Applicants' proposed wheeling policy without appropriate consideration; in concluding that the costs of the merger outweigh its benefits; and in rejecting benefits on the grounds that they are achievable by contract. 17/

The Applicants further contend that the judge erred in requiring that a method for allocating costs between the divisions be established prior to the merger; in determining that the impact of the merger on customers' rates cannot be determined; in finding that the merger may have a significant impact on interruptible rates; in concluding that the impact on the Bonneville Power Administration's rates cannot be determined

14/ Id. at 65,354.

15/ CREDA's Brief on Exceptions sets forth what it terms "minor factual corrections" to the Initial Decision. CREDA's Brief on Exceptions at 1. In lieu of a Brief on Exceptions, the Public Power Counsel and the Northwest Public Power Association filed a joint statement of counsel raising no substantive issues.

16/ Applicants Brief on Exceptions at 7.

17/ Id. at 7-8.

and that rates of other utilities may be adversely affected; in holding that operation as a single coordinated entity is constrained; in holding that shareholders should not share in the benefits of the merger; in finding that PacifiCorp Maine's diversified operations will have a significant impact on investors' risk perceptions of the merged company; and in determining that the merger will impair effective regulation of the merged company. 18/

Trial staff argues that the judge erred in finding that the costs of the merger would not be offset by the benefits of the merger; in interpreting the Commission order setting this matter for hearing as requiring cost of service data from the Applicants; in finding that the Applicants' rate proposals should have been more definitive than they were; in not considering trial staff's proposal for correcting the rate problems; in finding that it would not be possible to effectively regulate the merged company; in finding that trial staff and intervenors were denied a reasonable opportunity to comment on the Applicants' proposed wheeling policy; in concluding that the Commission lacks authority to impose wheeling conditions in approving a merger; and in failing to consider trial staff's proposed wheeling policy. 19/

Trial staff also argues that the Initial Decision incorrectly decides several issues that are significant to the future exercise of the Commission's authority. Specifically, trial staff argues that the Initial Decision: (1) sets forth an incorrect standard for determining whether the benefits of a merger exceed its cost; (2) applies an overly stringent standard for demonstrating future rate impact; (3) incorrectly finds an absence of authority to impose conditions necessary to remedy defects in a merger application; and (4) erroneously rejects effective proposals that would successfully address the development of appropriate future rates and certain adverse effects on competition that would otherwise be produced by the merger. 20/

Utah Associated Municipal Power Systems excepts to the Initial Decision to the extent that it finds that the Commission's authority to condition its approval of mergers under section 203 of FPA does not include the authority to require conditions relating to wheeling access or to require any other condition that is not strictly related to: (1) maintaining adequate service or coordinating the Applicants' facilities; and

---

18/ Id.

19/ Trial staff Brief on Exceptions at 6-7.

20/ Id. at 7-8.

(2) fine-tuning otherwise acceptable merger proposals that already satisfy the statutory public interest standards. 21/

Utah Associated Municipal Power Systems also excepts to the Initial Decision's failure to consider the wheeling policy as proposed by trial staff and others. They further except to the judge's failure to consider the alleged discriminatory effects of the merger on existing wheeling rates. 22/

Utah Associated Municipal Power Systems contends that policy considerations warrant Commission review of the Initial Decision. They point out that this is the first case involving a merger of this magnitude to come before the Commission under section 203 of the FPA. Thus, they argue that this case is of unusual significance to the electric utility industry and to the public. They also argue that the Initial Decision includes rulings that would sharply limit the Commission's authority to impose conditions on future mergers or acquisitions under section 203. Finally, they argue that since issues involving transmission pricing and access are central to this proceeding, the Commission's decision regarding those issues may have broad implications for the electric industry and its regulators. 23/

Sierra Pacific and Nevada Power Company except to the judge's failure to rule that in the event the merger is approved: (1) the Applicants' divisional pricing proposal should be rejected; (2) the post-merger wholesale fuel clause should be based on all fuel clause costs of the merged company; and (3) the merged company should be required to make an immediate rate filing.

Washington Water Power Company excepts to the judge's finding that opportunity cost pricing is premised on the absence of competition and leads to double recovery because an appropriate level of profit is already included in embedded costs. 24/ It also excepts to the judge's finding that profits obtained from brokering power sales are monopoly profits since they are based on value of service, and not on cost of service. 25/ Washington Water Power Company states that these findings do not adequately take into account the nature and

---

21/ Utah Associated Municipal Power Systems Brief on Exceptions at 8.

22/ Id. at 8-9.

23/ Id. at 9-10.

24/ Washington Water Power Company Brief on Exceptions at 2.

25/ Id.

quality of wholesale power transactions that may occur among utilities, absent monopolistic intent or conduct. 26/

The Utah Division of Public Utilities excepts to the judge's finding that the Applicants failed to show that there are substantial benefits to be achieved by the merger as well as to the finding that the merger should be denied because the merger benefits could be achieved by contract. 27/ It also excepts to the judge's concern for interruptible customers whose rates and service come under the jurisdiction of the Utah Public Service Commission. 28/ Finally, the Utah Division of Public Utilities excepts to the judge's conclusion that the merger would impair the ability of regulators to effectively regulate the merged entity. 29/

The Public Service Commission of Wyoming excepts to the judge's finding that regulation by state commissions would be impaired by virtue of the size and varied operations of the merged company. 30/ It argues that after an initial adjustment period, regulation of the new entity poses no significant or novel regulatory difficulties. 31/ Thus, the Public Service Commission of Wyoming states that it fully supports the merger and requests that the decision of the judge be overturned and the merger approved. 32/

AMAX excepts to the judge's finding that the Commission lacks broad authority to condition a merger. 33/ It argues that the merger should be approved so long as its proposed conditions regarding interruptible customers are adopted, and the Commission finds that the merger is otherwise consistent with the public interest. 34/

26/ Id. at 3.

27/ Utah Division of Public Utilities Brief on Exceptions at 3.

28/ Id.

29/ Id.

30/ Public Service Commission of Wyoming Brief on Exceptions at 2.

31/ Id. at 5-6.

32/ Id.

33/ AMAX Magnesium Corporation Brief on Exceptions at 6.

34/ Id.

Nucor Steel excepts to the judge's construction of section 203 of the FPA as being devoid of implicit authority to fashion conditions necessary and appropriate to assure that an otherwise unacceptable merger becomes consistent with the public interest. 35/ It also excepts to the judge's determination that conditions removing or overcoming restrictions embodied in the Applicants' wheeling policies are not necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission, as set forth in section 203(b). 36/ Finally, Nucor Steel excepts to the judge's failure to consider its proposed conditions aimed at preventing degradation of service to UP&L's interruptible customers. 37/

The Shareholder Association excepts to the judge's finding that transmission service is a relevant market for purposes of evaluating the effect of the merger on competition. 38/ Similarly, it excepts to the judge's finding that UP&L controls essential facilities and that the merged company would exercise undue market power. 39/ Finally, it excepts to the judge's ruling excluding the testimony of its witness. 40/

G. Briefs Opposing Exceptions

On July 11, 1988, Briefs Opposing Exceptions were filed by the following parties: the Applicants; trial staff; the United Mine Workers, *et al.*; Sierra Pacific and Nevada Power Company; Deseret G&T; Nucor Steel; AMAX; Utah Associated Municipal Power Systems; the Public Power Council and Northwest Public Power Association; NRECA/APPA, *et al.*; and CREDA.

35/ Nucor Steel Brief on Exceptions at 3. Pursuant to Rule 711(a)(1)(iii), 18 C.F.R. § 385.711 (1988), Sierra Pacific and Nevada Power Company incorporate by reference this same exception to the judge's Initial Decision. Brief of Sierra Pacific and Nevada Power Company on Exceptions, filed July 11, 1988.

36/ Id.

37/ Id.

38/ Utility Shareholder Association of Utah Brief on Exceptions at 5.

39/ Id.

40/ Id. at 4-5.

The Applicants oppose the exceptions taken by trial staff, the Utah Associated Municipal Power Systems, and Nucor Steel with respect to the Commission's authority to require wheeling as a condition on approval of the merger. However, the Applicants state that the wheeling policy proposed by trial staff is acceptable to them, and Applicants will not interpose any objection if that wheeling policy is required as a condition on approval of the merger. 41/

The Applicants also oppose the exceptions taken by trial staff, the Utah Associated Municipal Power Systems, Sierra Pacific, Washington Water Power Company, Nucor Steel, and AMAX with respect to their proposals to modify the Applicants' proposed wheeling policy and to impose rate conditions on approval of the merger. 42/

Trial staff opposes the exceptions taken by the Applicants with respect to the judge's finding that: (1) the merger would have an adverse effect on competition; (2) the costs of the merger would outweigh its quantifiable benefits; (3) certain alleged benefits of the merger should be rejected on the grounds that they are achievable by contract; (4) a method for allocating costs between the divisions should be established prior to the merger; and (5) the impact on the Bonneville Power Administration's (BPA) rates cannot be determined and that rates of other utilities may be adversely affected by the merger. 43/

Trial staff also opposes Sierra Pacific and Nevada Power Company's exception to the judge's failure to rule that the Applicants' post-merger jurisdictional rates must be based on rolled-in costing and that the post-merger wholesale fuel adjustment clause must be based on all fuel clause costs of the merger company. 44/

Finally, trial staff opposes Utah Associated Municipal Power Systems' exception to the Initial Decision's failure to consider potential discriminatory effects of the merger on existing wheeling rates. 45/ Trial staff argues that any proposed

---

41/ Applicants Brief Opposing Exceptions at 2-4.

42/ Id.

43/ Trial staff Brief Opposing Exceptions at 1-2.

44/ Id. at 2.

45/ Id.

increase in the wheeling rates of the merged company can be opposed at the time such a rate filing is made. 46/

The United Mine Workers, et al. oppose virtually all of the exceptions taken by the Applicants, trial staff, 47/ the Public Service Commission of Wyoming, the Utah Division of Public Utilities, the Utility Shareholder Association of Utah, and the Washington Water Power Company. 48/ They also oppose Utah Associated Municipal Power Systems' exception to the judge's failure to consider the wheeling policy proposed by trial staff and others.

CREDA opposes virtually all of the exceptions taken by the Applicants, 49/ trial staff, the Utility Shareholders Association of Utah, Utah Associated Municipal Power Systems, 50/ and the Utah Division of Public Utilities. 51/ CREDA also opposes the exceptions taken by Nucor Steel and AMAX with respect to the judge's finding that the Commission has only narrow authority to condition the merger.

46/ Id. at 58-9.

47/ The United Mine Workers, et al. do not oppose trial staff's exception to the judge's refusal to consider trial staff's proposal of having the merged company file future rate filings and allocation plans at definite times. Similarly, they do not oppose trial staff's exception to the judge's conclusion that the Commission lacks the authority to impose wheeling conditions in approving the merger.

48/ United Mine Workers, et al. Brief Opposing Exceptions at ix.

49/ CREDA does not oppose the Applicants' exception to the judge's ruling that the merger may have a significant impact on interruptible rates, that the impact on the Bonneville Power Administration's rates cannot be determined, and that the rates of other utilities may be adversely affected.

50/ CREDA does not oppose Utah Associated Municipal Power Systems' exception to the judge's failure to consider the discriminatory effects of the merger on existing wheeling rates.

51/ CREDA does not oppose the Utah Division of Public Utilities' exception to the judge's concern for interruptible customers whose rates and service fall under its jurisdiction.

NRECA/APPA, et al. oppose each of the exceptions taken by the Applicants and trial staff. 52/ However, their brief addresses only those exceptions relating to the effect of the merger on competition.

The Public Power Council and Northwest Public Power Association oppose many of the exceptions taken by the Applicants, trial staff, the Utility Shareholder Association of Utah, the Utah Division of Public Utilities, and the Public Service Commission of Wyoming. 53/ However, their brief addresses only those exceptions relating to the effect of the proposed merger on competition and on the effectiveness of regulation. 54/ Moreover, they adopt and support the positions taken by NRECA/APPA, et al. (except as to the imposition of conditions and the appropriateness of opportunity cost pricing), as well as the position taken by CREDA relating to costs and benefits of the merger and the need for cost of service information. 55/

Utah Associated Municipal Power Systems opposes the Applicants' exceptions to the judge's finding that the merger is likely to lessen competition in a relevant market. 56/ Utah Associated Power Systems, as well as AMAX, also oppose the Applicants' exception to the judge's dismissal of the Applicants' wheeling policy. 57/

Deseret G&T opposes the exceptions taken by Applicants insofar as Applicants argue that their proposed wheeling policy is equivalent to trial staff's, is supported by Deseret G&T, or offers adequate assurance of transmission access by transmission dependent utilities. 58/

Nucor Steel opposes virtually all of the exceptions taken by

52/ NRECA/APPA, et al. Brief Opposing Exceptions at 1.

53/ Public Power Council and Northwest Public Power Association Brief Opposing Exceptions at 1, 10-15.

54/ Id. at 4.

55/ Id. at 4-5.

56/ Utah Associated Power Systems Brief Opposing Exceptions at 2.

57/ UAMPS Brief Opposing Exceptions at 2; AMAX Brief Opposing Exceptions at 1.

58/ Deseret G&T Brief Opposing Exceptions at 2.

the Applicants and trial staff. 59/ It also opposes the exceptions taken by: (1) the Public Service Commission of Wyoming with respect to the effectiveness of regulation; (2) UAMPS with respect to the Applicants' proposed wheeling policy; (3) the Utah Division of Public Utilities with respect to the claimed benefits of the merger and the effect on interruptible customers; and (4) the Washington Water Power Company with respect to opportunity cost pricing. 60/

Sierra Pacific and Nevada Power Company oppose the Applicants' exception to the judge's rejection of claimed benefits to the merger on the grounds that they are achievable by contract. 61/ Sierra Pacific and Nevada Power Company also oppose the Applicants' exception to the judge's finding regarding shareholders' rights to share in the benefits of the merger, 62/ and his finding that the merger would impair effective federal or state regulation of the merged company. 63/ Finally, Sierra Pacific and Nevada Power Company oppose trial staff's exception with respect to the judge's rejection of staff's proposal to require future rate filings to correct rate problems associated with the merger. 64/

As discussed below, we affirm the presiding judge with respect to his finding that the proposed merger would likely substantially lessen competition and tend to create a monopoly. We also affirm the judge with respect to his finding that the proposed merger could adversely effect the ability of this Commission and the state commissions to effectively regulate the merged entity. Thus, we find that as a result of the likely adverse effect on competition and on the effectiveness of regulation, the proposed merger is not consistent with the public interest.

However, we reverse the judge with respect to his finding that the Commission lacks the authority to adequately condition the proposed merger. We find that there are certain terms and conditions under which the proposed merger would be consistent with the public interest and, moreover, that we have the

---

59/ Nucor Steel Brief Opposing Exceptions at 2.

60/ Id.

61/ Sierra Pacific and Nevada Power Company Brief Opposing Exceptions at 1.

62/ Id.

63/ Id.

64/ Id.

authority to impose such conditions. Thus, we shall conditionally approve the proposed merger, subject to the Applicants' acceptance of the terms and conditions set forth below.

II. Procedural Motions

A. Motion to Strike

On July 7, 1988, the Public Power Council and Northwest Public Power Association filed a motion to strike portions of the Shareholder Association's Brief on Exceptions. They argue that the Brief on Exceptions raises issues out of time regarding the judge's decision to strike the testimony of the Shareholder Association's witness, 65/ and that major portions of the brief rely solely upon the stricken testimony and contain no citations to the record in this proceeding. They contend that the Shareholder Association should have sought Commission review of the judge's decision to strike the testimony through an interlocutory appeal. 66/ They further argue that by attempting to bring the stricken testimony before the Commission at this stage of the proceedings, the Shareholder Association is attempting to deprive the parties of their right to due process, including the right to cross-examine the witness. 67/

On July 19, 1988, the Shareholder Association filed an answer to the motion, arguing that evidentiary rulings lack the requisite "extraordinary circumstances" necessary for an interlocutory appeal. In support of its argument, the Shareholder Association cites Trans Alaska Pipeline System, 68/ where the Commission refused to certify an appeal regarding an evidentiary ruling made by the presiding judge. The Shareholder Association also argues that since its witness was unavailable at hearing due to the judge's ruling (and through no fault of its own) there is no denial of due process.

We find that to admit the testimony of the Shareholder Association witness at this stage of the proceedings would infringe upon the right of the intervenors to due process. It would be unfair to overrule the judge and consider the testimony

---

65/ Order Granting Motion to Exclude Testimony, issued February 25, 1988.

66/ 18 C.F.R. § 385.715 (1988).

67/ On July 11, 1988, CREDA filed an answer in support of the Public Power Council\Northwest Public Power Association's motion.

68/ 23 FERC ¶ 61,102 (1983).

of a witness not subject to cross-examination, particularly where the sponsoring party made no attempt to promptly appeal the judge's ruling. The Shareholder Association's delay in bringing this issue before the Commission effectively denies the intervenors any opportunity to cross-examine the witness, or to offer rebuttal testimony.

The Shareholder Association's delay is not excused by its reliance on our ruling in Trans Alaska Pipeline System. That case involved a request for a ruling on evidence prior to its submittal. Thus, it dealt with an issue of when evidence was properly introduced, not whether it was admissable. Moreover, the Commission stated in that case that it would entertain an interlocutory appeal on evidentiary issues upon a showing of abuse of discretion by the presiding judge. This, in effect, is what the Shareholder Association is alleging in arguing that the judge improperly excluded its witness' testimony.

Thus, we will disregard the portions of the Shareholder Association's Brief on Exceptions which rely on the testimony stricken by the judge. We will also disregard the attachment to the Brief on Exceptions containing the excluded testimony.

B. Applicants' Request for Rejection of Briefs on Exception

In their Brief Opposing Exceptions, the Applicants argue that the Brief on Exceptions of Sierra Pacific and Nevada Power Company should be rejected as an attempt to buttress the conclusions of the presiding judge since the brief agrees with substantial portions of the Initial Decision. 69/ On July 14, 1988, Sierra Pacific and Nevada Power Company filed an answer to the Applicants' request for rejection, arguing that only a small portion of the brief focused on the presiding judge's findings, and, moreover, that the Applicants could not be prejudiced by support for the Initial Decision in the Brief on Exceptions since the Applicants then had the opportunity to criticize those arguments in the Applicants' Brief on Exceptions.

We agree that the statements in the Brief on Exceptions of Sierra Pacific and Nevada Power Company that support the Initial Decision constitute only a small portion of that brief. We also agree that the Applicants are not prejudiced by such statements since they had the opportunity to (and, in fact, did) respond to those statements. Thus, the Applicants' request for rejection will be denied.

The Applicants also argue that the Brief on Exceptions of AMAX should be disregarded since it: (1) contained a copy of

69/ Applicants Brief Opposing Exceptions at 14.

AMAX's Initial Brief to the presiding judge; (2) failed to include a numbered list of exceptions; and (3) contains no citations to the record and relies on purported statements of fact not found in the record. 70/ On July 21, 1988, AMAX filed a motion for waiver of the Commission's regulations, or, in the alternative, for leave to file a revised brief on exceptions (attached to the motion). Since AMAX's revised Brief on Exceptions presents no arguments not already raised in its original Brief on Exceptions (thus, no party will be prejudiced by allowing its substitution), and since the revised Brief on Exceptions now conforms to the Commission's regulations, we will grant AMAX's request to substitute its revised brief.

C. Motion Requesting Oral Argument

On July 11, 1988, Nucor Steel filed a motion pursuant to Rule 711(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.711(c) (1988), requesting oral argument before the Commission. Nucor Steel argues that briefs alone would not do justice to this case given its importance and the divergent views expressed by the various parties. However, we find that oral argument is unnecessary since the views of the parties have been stated clearly and comprehensively in their briefs on and opposing exceptions. Thus, Nucor Steel's motion will be denied.

D. Post-Hearing Motion to Intervene

On October 13, 1988, the Public Utilities Authority for the Town of Plymouth, Utah (the Authority) filed an untimely motion to intervene. It states that it is a municipality as defined in section 3(7) of the FPA, 71/ created on August 23, 1988 to provide retail electric service to local residential, commercial, and industrial customers (including Nucor Steel). The Authority states that no other participant in this proceeding can adequately protect its interests as a municipal electric system and purchaser of transmission service and electricity at wholesale.

On October 21, 1988, the Applicants filed an answer to the Authority's motion. The Applicants contend that at this stage of the proceeding, the late motion would result in additional burdens on the existing parties. They also contend that the Authority's interests are adequately represented by Nucor Steel.

Given that the Authority was not created until recently, we find that it had good cause not to seek intervention earlier. Moreover, the Authority is a potential competitor of the merged

---

70/ Id. at 21-22.

71/ 16 U.S.C. § 796(7) (1982).

company, unlike Nucor Steel which is a retail customer. Thus, we shall grant the Authority's motion to intervene out of time. However, we shall require that the Authority take the record as is, so as not to prejudice or burden any of the existing parties, or to delay these proceedings. 72/

III. Discussion

A. The Statutory Standard Under Section 203 of the FPA

Pursuant to section 203(a) of the FPA, a merger is to be approved if the Commission finds that it "will be consistent with the public interest." 73/ Under section 203(b), the Commission may grant any application "upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and proper coordination in the public interest of facilities subject to the jurisdiction of the Commission." 74/

As we noted in our order setting this matter for hearing, the Applicants need not show that a positive benefit to the public will result. 75/ Rather, the Applicants are required to fully disclose all material facts and carry the burden of showing affirmatively that the merger is compatible with the public interest. 76/

In Commonwealth Edison Company, et al. (Commonwealth), 77/ the Commission set forth the following non-exclusive list of factors that it would consider when determining whether a proposed merger is in the public interest:

> (1) the effect of the proposed action on the Applicants' operating costs and rate levels;
>
> (2) the contemplated accounting treatment;

72/ See, e.g. Public Service Company of New Hampshire, et al., 31 FERC ¶ 61,041 (1985).

73/ 16 U.S.C. § 824b(a) (1982).

74/ 16 U.S.C. § 824b(b) (1982).

75/ 41 FERC at 61,752, citing Pacific Power & Light Co. v. F.P.C., 111 F.2d 1014, 1017 (9th Cir. 1940).

76/ Id.

77/ 36 FPC 927 (1966), aff'd sub nom. Utility Users League v. FPC, 394 F. 2d 16 (7th Cir. 1968), cert. denied, 393 U.S. 953 (1968).

> (3) the reasonableness of the purchase price;
>
> (4) whether the acquiring utility has coerced the to-be-acquired utility into acceptance of the merger;
>
> (5) the effect of the proposed merger on the existing competitive situation; and
>
> (6) whether the consolidation will impair effective regulation either by this Commission or the appropriate state regulatory authority. 78/

In its order setting this matter for hearing, the Commission found that there was no need to set for hearing factors "2", "3", and "4". We found that: (1) the accounting treatment applied by the Applicants is in accordance with generally accepted accounting principles and the Uniform System of Accounts; (2) there were no allegations made and no evidence submitted that the merger was brought about by coercion; and (3) there was no showing that the purchase price was not reasonable. 79/ Thus, we set for hearing those issues that relate to the remaining enumerated factors.

Some intervenors had suggested that in addition to the factors enumerated in Commonwealth, the Applicants must be held to the "single integrated public utility-system" standard contained in the Public Utility Holding Company Act of 1935 (PUHCA). 80/ However, in our order setting this matter for

---

78/ 36 FPC at 932.

79/ 41 FERC at 61,755.

80/ 15 U.S.C. § 79j(c)(2) (1982). An "integrated public utility-system" is defined as

> a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of
> (continued...)

hearing we stated that "we need not strictly apply the provisions of PUHCA . . . . Our focus must be on the impact on the public interest of the merged entity's operation." 81/ Thus, as noted above, we set for hearing the issue of whether the merged companies will be capable of being operated economically and efficiently as a single entity, as well as the impact on the public interest of the merged entity not operating as a single entity to the extent such is found to be the case. 82/

B. The Commission's Authority to Condition a Merger

As noted, the Commission has the authority to deny approval of a merger if it is not "consistent with the public interest." It follows, therefore, that if the Commission can deny approval of the proposed merger, it must also be able to take the less restrictive step of conditioning its approval; the power to condition approval is fairly subsumed within the broader power to disapprove. 83/ If we were to simply deny approval of the merger, the Applicants could then file a new application satisfying our concerns. Conditioning approval in the first instance achieves precisely the same result. In either case, the Applicants can pursue the merger consistent with the terms specified by the Commission or, if they choose, forgo the merger. Thus, conditioning the merger so as to make it consistent with the public interest represents no extension of the Commission's authority.

Citing Central Maine Power Co., et al. (Central Maine), 84/

> 80/(...continued)
> the art and the area or region affected) the advantages of localized management, efficient operation and the effectiveness of regulation. . . .

15 U.S.C. § 79(a)(29)(A) (1982).

81/ 41 FERC at 61,753.

82/ Id.

83/ Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158 (D.C. Cir. 1967). In that case, the court examined the Commission's authority to conditionally license a hydroelectric project under Part I of the FPA. The court stated that the provisions of the FPA imply broad Commission authority and that the FPA is not to be read to require justification of each action by reference to express statutory authorization. Id.

84/ 55 FPC 2477 (1976).

the judge found that the Commission's statutory authority to condition a merger is narrower than its broad power to determine whether the merger itself is consistent with the public interest. 85/ We disagree. In Central Maine, the Federal Power Commission found that it was "clearly empowered to reject a merger proposal which is inconsistent with the public interest," but that its "authority to modify the merger agreement itself is limited to circumstances where conditions are necessary to ensure reliability and system coordination." 86/ However, the Commission found in that case that (even absent conditions) there had been no showing that the proposed merger was inconsistent with the public interest. Thus, Central Maine stands only for the proposition that the Commission's authority to condition a merger that has been shown to be consistent with the public interest under section 203(a) is limited to the authority explicitly conferred by section 203(b). Since we find, as discussed below, that the proposed merger is not consistent with the public interest absent conditions, the statement in Central Maine cited by the judge is inapplicable to this proceeding.

Citing City of Paris v. Kentucky Utilities Co. (City of Paris), 87/ and Union Electric Co., 88/ the judge found that the Commission lacks the authority to order wheeling access as a condition on its approval of the proposed merger. However, these cases are inapposite to the instant proceeding. The Commission merely stated in City of Paris that it lacked the authority to order wheeling under section 202 of the FPA. 89/ That case did not involve a merger proposal under section 203 that was found to be inconsistent with the public interest. Similarly, although Union Electric Co. involved a proposed merger where the Commission refused to order wheeling, the requested wheeling conditions were not "relevant to the merits of the merger application" and thus were not necessary to remedy any adverse effects of the merger. 90/ Accordingly, the Commission's authority to order wheeling to remedy the anticompetitive effects of a merger was not at issue in either case.

85/ 43 FERC at 65,354.

86/ 55 FPC at 2484.

87/ 41 FPC 45 (1969).

88/ 25 FERC ¶ 61,394 (1983).

89/ 16 U.S.C. § 824a (1982). Section 202 deals primarily with the Commission's authority to encourage and/or order the interconnection of electric facilities.

90/ 25 FERC at 61,875.

Similarly, the judge's reliance on Otter Tail Power Co. v. U.S. (Otter Tail) 91/ is misplaced. In Otter Tail, the Court found that a District Court order requiring wheeling to correct anticompetitive practices did not conflict with the authority of the Federal Power Commission since no authority was granted under Part II of the Federal Power Act to order wheeling. 92/ However, Otter Tail simply construed the Commission's power to order interconnections under section 202 of the FPA as not carrying with it mandatory wheeling authority. It did not address, much less decide, how far the Commission's authority extends in proceedings brought under section 203 to remedy the anticompetitive effects of a merger.

The judge found that Richmond Power & Light Co. v. FERC (Richmond) 93/ prevents the Commission from ordering wheeling in this proceeding since "[w]hat the Commission is prohibited from doing directly it may not achieve by indirection." 94/ In Richmond, the Commission refused to condition its acceptance of rates for voluntary, temporary wheeling on an agreement by the utilities to provide continued (involuntary) wheeling. The court affirmed the Commission's decision, finding that "[i]f Congress had intended that utilities could inadvertently bootstrap themselves into common-carrier status by filing rates for voluntary service, it would not have bothered to reject mandatory wheeling in favor of . . . voluntary wheeling." 95/

Thus, a Commission order requiring wheeling, without more, is impermissible since it would impose common-carrier status on the wheeling utility. In this case, however, the requirement that the merged company wheel power is based on our finding of likely anticompetitive effects of the merger. Accordingly (and as distinguished from the Richmond case), a requirement that it wheel power for competitors in order to ameliorate the likely anticompetitive effects of the merger would not serve to make the merged company a common-carrier. Thus, the Commission is not doing indirectly (making the merged company a common carrier) what it is prohibited from doing directly.

91/ 410 U.S. 366 (1973).

92/ The Federal Power Act was later amended to include certain authority to order wheeling. 16 U.S.C. §§ 824i-k (1982).

93/ 574 F.2d 610 (D.C. Cir. 1978).

94/ 43 FERC at 65,354 citing 574 F.2d at 620.

95/ 574 F.2d at 620.

The Applicants cite, inter alia, New York State Electric & Gas Corp. v. FERC (NYSEG) and Florida Power and Light Co. v. FERC (Florida) 96/ as limiting the Commission's authority to order wheeling in this proceeding. In NYSEG, the Court vacated a Commission order issued under section 206 of the FPA that would have resulted in an expansion of NYSEG's voluntarily commitment to wheel power. The court concluded that electric utilities are not common carriers under the FPA and that the Commission's powers to regulate transmission contracts pursuant to section 206 does not permit the Commission to expand a utility's commitment to wheel. Thus, the issue before the court was whether, under section 206, the Commission could expand a voluntary commitment to wheel without complying with the statutory prerequisites of sections 211 and 212 of the FPA. 97/ The Commission's authority under section 203 to order wheeling to remedy the anticompetitive effects of a merger was not at issue.

Similarly, in Florida the court found that a Commission order under section 205 expanding a voluntary commitment to wheel would impermissibly impose common carrier status on the utility. Again, however, the Commission's authority under section 203 to order wheeling to remedy the anticompetitive effects of a merger was not in issue. In fact, the court specifically declined to address the issue of "whether the Commission has authority to compel wheeling as a remedy for specific findings of anticompetitive activities or antitrust violations." 98/

96/ 638 F.2d 388 (2d Cir. 1980), cert. denied, 454 U.S. 821; 660 F.2d 668 (5th Cir. 1981).

97/ 638 F.2d at 401. Under sections 211 and 212 of the FPA, the Commission may require one electric utility to provide transmission service to another utility, provided certain substantive and procedural requirements are met. 16 U.S.C. §§ 824i-k (1982). Under these provisions, wheeling may not be ordered unless the Commission determines, inter alia, that existing competitive relationships would be reasonably preserved. 16 U.S.C. § 824j(c). We note that sections 211 and 212 do not provide a basis to order wheeling in this proceeding since, as discussed below, the conditions are specifically designed to ameliorate the merged company's market power over transmission, thus altering competitive relationships.

98/ 660 F.2d at 679. We note that the cases decided under sections 202, 205 and/or 206 (discussed above) can be distinguished from this case. Under section 203, the Commission has primary, affirmative authority to determine whether a proposed merger is consistent with (continued...)

For the foregoing reasons, we find that the Commission has broad authority under section 203(a) to condition approval of a merger that would not, but for such conditions, be consistent with the public interest. 99/ We find that this authority includes the power to order wheeling for so long as such a condition is necessary to avoid the likely anticompetitive effects of a proposed merger, and the tendency of that merger to create a monopoly. 100/

In addition to the implied authority under section 203(a) of the FPA to condition a merger that would not otherwise be consistent with the public interest, our authority under section 203(b) of the FPA includes the power to impose conditions on a

---

98/(...continued)
the public interest. In each of the other cases, there existed a remedy at law, without resort to the FPA, through which aggrieved parties could seek relief.

99/ We note that the recent decision in South Carolina Public Service Authority v. FERC, No. 87-1146, slip op. (D.C. Cir. July 5, 1988), does not conflict with our authority to impose conditions in this proceeding. In that case, the court ruled that the Commission lacks the authority under Part I of the FPA to condition the licensing of a hydroelectric project on the licensee's agreement to provide compensation for all foreseeable property damage caused by seismically induced dam failure. Slip op. at 2. The court held that the FPA does not give the Commission the authority to displace existing tort law, a matter traditionally left to the states, with its own rules of liability for damages caused by licensees. The court noted that while Part I of the FPA requires the Commission to ensure that a project is safe before licensing, the protection of "life, health, and property," 16 U.S.C. § 803(c) (1982), does not equate with compensation for damage to property, as ordered by the Commission. Slip op. at 9. In this proceeding, however, the conditions imposed do not conflict with existing state tort law, and, moreover, arise under our authority under a different section of the FPA (section 203). Thus, the imposition of conditions in this proceeding does not conflict with the decision in South Carolina Public Service Authority v. FERC.

100/ We also note that section 203(b) provides that the "Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate."

merger that are necessary and appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. As discussed below, we are conditioning our approval of this merger on the Applicants' agreement, inter alia, that they wheel power for competitors under certain terms and conditions in order to remedy the merger's likely adverse effect on competition. As discussed below, if we were to approve the merger without such conditions, utilities that compete with the merged company could be denied access to the merged company's strategically located transmission facilities. This, in turn, could affect the coordination of jurisdictional facilities.

As we explained in Public Service Company of New Mexico, et al., 101/ coordination between independent utilities can be achieved in a variety of ways. Coordination has been successfully achieved through formal power pools - provided that membership is widely available and transmission services readily provided to effectuate pool transactions. Coordination can also be achieved through "the operation of a market, supplemented by reliability agreements." 102/ With the successful operation of a market "through a multitude of independent decisions, the actions of individual utilities are coordinated so that the region moves closer to the generation configuration that would produce electricity at lowest possible cost." 103/ Since no region-wide power pool exists within the WSCC, the strategic dominance of the merged company over transmission could interfere with the coordination of jurisdictional facilities by handicapping the operation of a well-functioning bulk power market.

Accordingly, in addition to our authority under section 203(a), we find that our authority under section 203(b) includes the power to impose those terms and conditions that are aimed at remedying the merger's likely adverse effect on competition since those conditions are necessary to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The impact of the merger on coordination of jurisdictional facilities is an additional factor that led us to impose the conditions set forth below.

C. The Effect on Competition

1. The Commission's Responsibilities

101/ 25 FERC ¶ 61,469 (1983).

102/ 25 FERC at 62,038.

103/ 25 FERC at 62,039.

In exercising its public interest responsibilities, the Commission must consider the policies that underlie the antitrust statutes. 104/ By considering antitrust and anticompetitive issues, the Commission serves as "a first line of defense against those competitive practices that might later be the subject of antitrust proceedings." 105/ Thus, the Commission is obligated to consider possible anticompetitive consequences flowing from a proposed merger, and allegations of anticompetitive conduct may properly be raised in proceedings under section 203 of the FPA. 106/

We note, however, that the Commission is not strictly bound by, and not empowered to enforce, the antitrust laws; they are employed to give understandable content to the broad statutory concept of the public interest. 107/ It is our responsibility to make findings related to the pertinent antitrust statutes and weigh them along with other important public interest considerations. 108/

2. The Applicable Antitrust Statutes

The antitrust statute that sets forth the basic legal standard generally applicable to mergers is Section 7 of the Clayton Act. 109/ It prohibits an acquisition or merger where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Mergers and acquisitions may also violate the Sherman Act as an agreement or combination in restraint of trade (Section 1) or the willful acquisition or exercise of monopoly power (Section 2). In determining whether a merger violates Clayton Act § 7 because it tends to create a monopoly, precedent under the Sherman Act is relevant in considering what amounts to monopoly

---

104/ Gulf States Utilities Co. v. FPC, 411 U.S. 747, 758-60 (1973); FPC v. Conway Corp., 426 U.S. 271, 279 (1976).

105/ 411 U.S. at 760.

106/ 411 U.S. at 757.

107/ Northern Natural Gas Co. v. FPC, 399 F.2d 953, 960 (D.C. Cir. 1968), citing California v. FPC, 369 U.S. 482, 490 (1962). Similarly, the Commission does not have jurisdiction to determine violations of the antitrust laws.

108/ Id.

109/ 15 U.S.C. § 18 (1982).

power and what constitutes a significant increase in market or monopoly power. 110/

Thus, consistent with its obligation to take into account the policies underlying the antitrust statutes, the Commission directed the parties to address at hearing whether the proposed merger would tend to create a monopoly and whether it would be likely to substantially lessen competition. 111/ We also set for hearing the issue of whether the merged company would have control over facilities that are essential to participation in the bulk sales market. 112/

3. Analysis of the Effect on Competition

As discussed below, we affirm the judge with respect to his finding that the proposed merger is likely to result in a substantial lessening of competition in the relevant product and geographic markets. 113/ We find that UP&L presently exercises monopoly power in regard to its essential transmission facilities. We further find that the merger of UP&L's transmission facilities with PP&L's generation and transmission facilities would enhance that ability to exercise monopoly power. Thus, we conclude that the potential adverse effect on competition that would likely result from the merger is inconsistent with the policies underlying the antitrust statutes.

a. The Relevant Markets

The first step in assessing the likely effect of a proposed merger on competition is to define the relevant product and geographic markets that will be affected. 114/ In this case, the relevant product markets include bulk power and transmission. The presiding judge correctly determined that transmission is a separate product market from the bulk power market since it can

---

110/ Section 7 of the Clayton Act was enacted to enhance the Sherman Antitrust Act by arresting mergers that tend to lessen competition "in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950) (quoted in Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.32 (1962)).

111/ 41 FERC at 61,754.

112/ Id.

113/ 43 FERC at 65,359.

114/ United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391-93 (1956).

be sold separately and one product cannot be substituted for the other. They exist at separate levels in the vertical structure of the electric industry. 115/ All parties addressing the issue agree that bulk power also constitutes a relevant product market. 116

The relevant geographic market for bulk power consists of the geographic area covered by the member systems of the Western Systems Coordinating Council (WSCC) since this is the area within which the merging companies compete, and within which buyers can reasonably turn to purchase bulk power. 117/

The relevant geographic markets for transmission include the transmission paths, described below, through which the relatively low-cost power generated in the Northwest Power Pool Area (Northwest) may be delivered to markets in the Southwest (California, southern Nevada, and the Desert Southwest), where the majority of bulk power purchasers in the WSCC are located. 118/ Similarly, the transmission facilities connecting the Rocky Mountain Area of the WSCC with the Northwest constitute a relevant geographic market.

Applicants argue that these transmission paths are not relevant geographic markets. 119/ We disagree. There are two significant general transmission paths through which the abundant low-cost power generated in the Northwest can be sold to buyers

---

115/ Ex. 178 at 14; Ex. 84 at 14; Ex. 99 at 2. We note that, although the Applicants argue to the contrary, all intervenors that addressed this issue, together with trial staff, found transmission to be a separate relevant product market. Id. See also Town of Massena v. Niagara Mohawk Power Corp., 1980-2 CCH Trade Cases ¶ 63,526 at 76,798 (N.D.N.Y. 1980), where the court found that generation, transmission, and distribution service each constitute an identifiable product market.

116/ See, e.g., Ex. 14 at 9-10; Ex. 178 at 15; and Ex. 84 at 42-43.

117/ Ex. 178 at 16; Ex. 84 at 44-46. We recognize that limitations on transmission access can inhibit the efficient functioning of that market by precluding some transactions from being made. However, the WSCC represents the overlying area within which them main bulk electricity competition occurs. Ex. 84 at 45-46.

118/ Ex. 84 at 18. The Desert Southwest is comprised of the Arizona-New Mexico subregion of the WSCC. Id.

119/ Applicants Brief On Exceptions at 19-23.

in the Southwest. 120/ The concentration of potential bulk power purchasers in the Southwest makes access to the transmission facilities connecting these regions to the resource-rich Northwest critical to the effectiveness of competition. 121/ Thus, we find that these two major transmission paths connecting the Northwest to the Southwest are relevant geographic markets.

Similarly, transmission capacity between the Rocky Mountain area and the Northwest is important to reducing power costs in the WSCC, since, when surplus hydroelectric power is unavailable, a large part of the WSCC relies on coal-fired resources from the Rocky Mountain area. 122/ Thus, transmission linking the two areas also constitutes a relevant geographic market.

b. The Transmission Markets

The transmission markets through which bulk power can be delivered to the Southwest consist of an eastern and western corridor. 123/ The western corridor consists primarily of the A.C. and D.C. Pacific Interties, which are predominantly controlled by BPA, while Portland General Electric Company and PP&L both control smaller shares. 124/ The eastern corridor

---

120/ 43 FERC at 65,344; Ex. 178 at 33-34; Ex. 80 at 4. Utilities in the California-southern Nevada area aggressively seek economy energy purchases throughout the WSCC due to the high percentage of relatively expensive gas and oil fired generation in that area. 43 FERC at 65,344; Ex. 214, Sch. 5. Hydroelectric resources, which have the lowest marginal operating costs of bulk power resources located within the WSCC, are heavily concentrated in the Northwest. 43 FERC at 65,344; Ex. 15, Schs. 9, 11. There is also a substantial supply of low marginal cost coal-fired generation in the Northwest Power Pool area which is not committed to native load customers. Ex. 207 at 20.

121/ 43 FERC at 65,344 and 65,358.

122/ Ex. 211 at 19.

123/ Id.

124/ Id. The A.C. Pacific Intertie has a combined capacity of 3200 MW, of which PP&L has a 300 MW entitlement. Ex. 80 at 7. Portland General Electric Company has an 800 MW entitlement to the A.C. Pacific Intertie, with the remaining 2100 MW controlled by the BPA. Id. The D.C. Pacific Intertie has a capacity of 1956 MW, all of which is controlled by BPA. Id. at 9. In addition to (continued...)

consists of the entire east side of the WSCC transmission grid, although access for Northwest producers is predominantly controlled by UP&L and PP&L. 125/

By combining the transmission facilities of UP&L and PP&L, PacifiCorp Oregon would effectively control access by Northwest sellers to the Southwest through the eastern corridor. For access using the eastern corridor, Northwest sellers would be essentially limited to one of the three interconnection points at Mona, Glen Canyon, or Four Corners, each of which will be controlled by the merged company. 126/ Although PacifiCorp would control a smaller share of the western corridor, BPA controls the predominant share through its control of the Pacific Interties.

Thus, sellers in the Northwest seeking to sell power into the Southwest would essentially be limited to transmission

---

124/(...continued)
the Interties, the western corridor also contains a 100 MW capacity transmission line owned by PP&L. Thus, the combined capacity of the western corridor is 5256 MW, of which 4056 MW is controlled by BPA, 800 MW by Portland General Electric Company, and 400 MW by PP&L.

125/ Ex. 178 at 34-36; Ex. 80 at 19-20. For access to the Southwest, the primary alternative to lines owned by UP&L is the Intermountain Power Project (IPP) D.C. line (1920 MW). However, access to the IPP line for Northwest sellers can effectively be obtained only through UP&L's Mona substation. Ex. 80 at 12. Therefore, UP&L effectively controls access to the IPP line.

The eastern corridor also contains some low-capacity transmission lines owned by the Western Area Power Administration (WAPA) and others that do not provide significant access to the Southwest. Ex. 80 at 14-16. In addition, there are three small transmission lines that require transmission around UP&L's system through Colorado for power to be sold to the Southwest. However, these three lines are not economically feasible alternatives for most of these transactions since, among other reasons, wheeling charges would have to be paid to at least three other utilities and such transactions would involve substantial transmission line losses. Ex. 80 at 17.

126/ Exs. 80 and 81.

facilities controlled by BPA or the merged company. 127/ Access through BPA, however, must conform to BPA's Intertie access policies that restrict the ability of utilities to engage in both firm and non-firm sales. 128/ Moreover, the Interties provide meaningful access only to California and not to the Desert Southwest. Therefore, as found by the judge, the merger would give the Applicants strategic dominance over transactions from the Northwest into the Southwest. 129/

The Applicants attempted to demonstrate that alternative transmission paths do, in fact, exist for sales into the Southwest. 130/ They asserted that there are three transmission lines that could be used to transmit power through the IPP line into California, thus avoiding UP&L's control of access to that line through UP&L's Mona substation. 131/ However, each of these

---

127/ Ex. 80 at 20. The merged company's dominance over transmission to the Southwest, as further described below, is derived from its strategic location which permits it to control power flows to those markets. Moreover, an evaluation of the concentration of ownership of transmission facilities (rather than control) leads to the same conclusion. The Applicants' own analysis, using the Herfindahl-Hirschman Index (HHI), confirms that ownership of transmission capacity is highly concentrated pre-merger, and will be even more concentrated post-merger. The HHI is a measure of concentration of ownership in a relevant market. Under the 1984 Merger Guidelines of the Department of Justice, 2 Fed. Reg. Rep. (CCH) ¶ 4490 (June 29, 1984), a merger in a highly concentrated market (i.e., with an HHI index exceeding 1800) will likely be challenged if the increase in the index exceeds 50 points. Applicants' own witness Landon calculated a pre-merger HHI of 3029 and a post-merger HHI of 3091, yielding an increase of 62. Ex. 213 at 34.

128/ Ex. 80 at 20.

129/ 43 FERC at 65,358. We find Idaho Power Company witness Durick's analysis showing the merged company's dominance over transmission into the Southwest to be a well-reasoned and accurate assessment. Exs. 80 and 81.

130/ Ex. 212, Sch. 3 at 2.

131/ Tr. 3276-77. Applicants' witness Tucker also argues that utilities anywhere along the eastern transmission corridor have equal control over access to the Southwest because of their "mutual dependent

(continued...)

alternatives is either non-existent or not feasible: one line, (the only direct north-south path) is owned by UP&L; the second line (Gonder-IPP) is presently not operable; and the third line (Bonanza-Mona, an east-west line) involves a circuitous route around UP&L's system that is not economically feasible. 132/

There is also substantial transmission capacity connecting the Rocky Mountain area of the WSCC with the Northwest. As noted above, transmission capacity between these two areas is important to reducing power costs in the WSCC. PP&L controls the largest share of that capacity, with a 72.5 percent market share. 133/ UP&L controls the next largest share (15.7 percent). 134/ As a result of the merger, PP&L and UP&L would combine their control of existing transmission between the Northwest and the Rocky Mountain area, resulting in a combined market share of 88.2 percent. 135/

c. Foreclosure of Competition from the Transmission Market

As discussed below, the record establishes that prior to the merger (even without the additional transmission control that would result from the merger) UP&L's transmission system constitutes an essential facility since: (1) UP&L's system is controlled by a monopolist; (2) competitors are unable to economically duplicate it; (3) its use has been denied to

---

131/(...continued)
relationship" which dictates that each company can not arbitrarily exercise control to exclude the others. Ex. 211 at 5. However, UP&L's has admitted, as discussed below, that it has never provided firm wheeling to the major Northwest suppliers for sales into the Southwest. This shows that the alleged "mutual dependent relationship" has not prevented UP&L from foreclosing competitors by denying access to the Southwest at its interconnection points.

132/ Tr. 3275-78; Ex. 80 at 17.

133/ Ex. 178 at 56.

134/ Id.

135/ Ex. 178 at 56. Thus, HHI calculations for the transmission market between the Rocky Mountain area and the Northwest Power Pool area show a pre-merger index of 5,643, with an increase of 2,277 points as a result of the merger. Ex. 178 at 46, 56.

competitors; and (4) it is feasible to make the facilities available to competitors. 136/

First, as demonstrated above, UP&L controls access to the Southwest along the eastern corridor through its three interconnection points at Mona, Four Corners, and Glen Canyon. Virtually all sales by Northwest suppliers using the eastern corridor must pass through one of these points. Second, it is not economically feasible for competitors to duplicate UP&L's transmission facilities within a reasonable time due to barriers to entry in the construction of direct transmission paths from the Northwest to the Southwest. 137/ The Applicants' own witness testified that he was unable to cite an instance in which a major transmission line was built anywhere within three years. 138/

Third, UP&L has exercised this monopoly control by foreclosing competitors from using its transmission facilities to sell power at UP&L's southern interconnections. As found by the judge, UP&L has consistently refused to permit the wheeling of low-cost power across its system in order to use its strategically located bottleneck to extract monopoly prices. 139/

136/ See MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1520-21 (10th Cir. 1984), aff'd 472 U.S. 585 (1985).

137/ Ex 178 at 66-68. These barriers include: (1) the combination of the great distances involved and the need to build to high voltages in order to obtain economies of scale and reduce transmission losses in operation; this results in high cost as well as the need to construct on a joint basis. Id.; (2) since the Federal government is the major landowner in the western United States, siting and environmental impacts requirements must be met - adding significant cost and delay. Id.; (3) transmission in Utah must be approved by the Utah Public Utility Commission. Utilities, other than those located in Utah, may find it difficult to obtain approval to construct transmission through Utah without UP&L's cooperation. Id. at 68-69. UP&L has actively sought to prevent other utilities from building transmission in Utah. See NRECA/APPA Brief Opposing Exceptions at 71-74; and (4) it takes several years for entry into transmission even under cooperative conditions among competing utilities and longer under uncooperative conditions. Ex. 178 at 70.

138/ Tr. at 3555.

139/ 43 FERC at 65,357; Tr. 3575-76; Ex. 325.

Moreover, UP&L admits that it has never provided firm wheeling service to any major Northwest utility wishing to sell to buyers in the Desert Southwest, southern Nevada or California. 140/

Fourth, it is clearly feasible for UP&L to provide transmission service to competitors, since, instead of wheeling for its competitors, UP&L has bought the low cost, hydroelectric and coal power at its northern interconnection points and sold it at its southern interconnection points. 141/ Accordingly, we find that UP&L's transmission system is presently an essential facility controlled by a monopolist (UP&L).

Following the merger, PacifiCorp Oregon would control the essential facilities previously owned by UP&L, as well as PP&L's transmission facilities. As a result, PacifiCorp Oregon would have enhanced ability to exercise monopoly power over transmission in the relevant geographic markets. This increased control of transmission between the Northwest and the Southwest, as well as the Rocky Mountain area, enhances the merged company's ability to foreclose competition for sales of bulk power. 142/

d. Anticompetitive Effects

The ability to foreclose competition can result in two types of anticompetitive harms. First, by refusing to wheel low-cost power from the Northwest, the merged company could instead buy the power, and, in reselling it, extract monopoly profits. Second, the merged company could give preference to its own generation over that of competitors for sales into southwestern markets (even when the latter is cheaper).

"The traditional starting point for determining the existence of monopoly power is to compare prices with incremental costs." 143/ By refusing to wheel power and instead engaging in buy/sell transactions, UP&L is able to charge a price that reflects more than the cost of the transmission service it

---

140/ Tr. 411.

141/ Ex. 84 at 54-55.

142/ 43 FERC at 65,359. Moreover, if transmission lines presently under construction or planned in the near term are completed, the merged company's control over transmission could be further increased by connecting eastern and western generation. This could result in even further enhancement of the ability to exercise monopoly power. Id. at 65,358.

143/ Pacific Gas & Electric Co., 38 FERC ¶ 61,242 at 61,801 (1987).

provides. 144/ For example, in 1986 UP&L paid an average of 9.5 mills for Northwest power and sold power at its Four Corners interconnection in the Southwest at 19 mills, a difference that far exceeds conventional wheeling charges. 145/ We note that nowhere in the record has UP&L claimed that its cost of transmission service supported the effective price that it was charging for such service. UP&L's sales of power at a price that is maintained at a level far exceeding its costs, coupled with its ownership and control over essential transmission facilities, demonstrates its market power to extract monopoly profits.

In addition to its ability to engage in buy/sell transactions, the merged company could use its market power in transmission to sell PP&L's excess coal-generated capacity to buyers in the Southwest, displacing cheaper northern alternatives. PP&L's coal-generated capacity comprises approximately 52% of its total generating capacity, 146/ some of which PP&L is unable to sell. 147/ Pre-merger, PP&L was unable to get this power to the Southwest because it could not compete with cheaper alternatives for the limited transmission capacity available. 148/ Following the merger, the merged company will be

---

144/ Ex. 84 at 54-55.

145/ Id. In fact, in 1985 the average price for economy energy sales by UP&L at Four Corners was 28 to 30 mills before falling to 19 mills in 1986, "a year of unusually low oil and gas prices." Id. at 65. In contrast, marginal operating costs of the major Northwest suppliers were considerably less. Id. at 62-64. For example, Montana Power Company's marginal generating units are coal fired, with a running cost of 8 mills. Id. Idaho Power Company can often sell hydroelectric power at a negligible operating cost in the Spring, and it has excess coal generation at 14-15 mills. Id. These cost differences between Northwest and Southwest suppliers result from the fact that about two-thirds of the generation in the Northwest is from hydroelectric facilities, and coal units supply another one-quarter, while more than one-half of the generation in the California-southern Nevada market is produced by more expensive gas and oil units. Ex. 214, Sch. 5.

146/ Ex. 8 at 13; Ex. 9, Sch. 5.

147/ Tr. 2473-74.

148/ Id. As discussed above, n.136, the record indicates that both Montana Power Company and Idaho Power Company have cheaper power available with which PP&L is at a (continued...)

able to market its more expensive coal-fired generation in the Southwest while denying access to other sellers with less expensive generation. 149/ Moreover, the Applicants have testified that they expect to be able to sell this power as a result of the merger. 150/ Thus, we find that following the merger, there is a substantial likelihood that the merged company would give preference to its own bulk power, while denying access to competing sellers.

The record indicates that UP&L has in the past engaged in inefficient transactions in order to avoid the possibility that some of its generation might be excluded from rate base as not "used and useful." A study prepared for PP&L was used by PP&L in evaluating whether to pursue the merger. 151/ That study concludes that in light of UP&L's very large surplus of capacity as compared to its load, instead of using cheaper energy, UP&L is running generating units it otherwise would not in order to avoid the "used and useful" issue. 152/ The study further concludes that UP&L is thus incurring a higher level of cost than if UP&L were running its system efficiently. 153/ With the addition of PP&L's excess generating capacity to UP&L's excess capacity, the

---

148/ (...continued)
competitive disadvantage in seeking access to the lines to the Southwest that UP&L controls. Ex. 84 at 62-64.

149/ Enhanced control over transmission is not necessary to give the merged company the ability to displace cheaper alternatives with its own power. The merged company's ability to favor its own generation arises from the vertical combination of essential transmission facilities with PP&L's excess generation. 43 FERC at 65,344. In contrast, the merged company's enhanced ability to foreclose competition, as discussed above, is brought about by the increase in control over transmission resulting from the merger.

150/ Tr. 2473-74.

151/ Ex. 41.

152/ Id. at 5.

153/ Id. UP&L's ability to engage in this inefficient practice is further evidence of its market power over transmission.

merged company would have more reason to engage in this practice. 154/

Further evidence of an incentive to the merged company to use its own higher-cost generation over lower-cost alternatives is a concern expressed by UP&L at a meeting with PP&L "that deregulation will put a 'claim' on their unused transmission unless put to firm use." 155/ Thus, the merger would enable the merged company to use excess PP&L generation (which would then be the merged company's own generation) to avoid such a result.

The displacement of competitors' lower-cost generation with PP&L's higher-cost power is likely to produce a substantial adverse effect on competition and harm to consumers. Where more expensive generation would displace cheaper generation there will be a loss of economic efficiency. Generation in the Northwest would not be produced at the lowest cost, while the under-utilization of cheaper sources would distort investment signals, resulting in less than optimal investment in those sources.

We note that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2 [of the Sherman Act]. . ." 156/ We are unpersuaded by the merged company's assurances that it will not deny access to competitors in the future. We agree with the judge that the record is devoid of any evidence that could lead to any other conclusion. 157/

Thus, we find that even taking into account the potential benefits to be realized from the merger, discussed below, the merger as proposed is not consistent with the public interest as a result of its likely adverse effect on competition.

4. Conditions to Ameliorate the Potential Adverse Effect on Competition

As discussed above, following the merger the merged company will be able to use its control over transmission to foreclose

---

154/ Although UP&L is not buying all the low-cost power that it could, it still purchases substantial quantities. UP&L Form No. 1 data, 1986 and 1987. Thus, after the merger, PP&L's generation could displace even more of the available lower-cost generation.

155/ Ex. 98.

156/ Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979).

157/ 43 FERC at 65,341.

competition in the relevant product and geographic markets. We believe that the conditions set forth below are the minimum necessary to alleviate these likely anticompetitive effects so as to make the merger consistent with the public interest.

The conditions are designed to provide a long-term remedy to the likely anticompetitive effects of the merger. Thus, we are imposing an absolute obligation on the merged company to provide firm wholesale transmission service at cost-based rates to any utility 158/ that requests such service. This long-term obligation is necessary to prevent the merged company from exercising its market power to foreclose access by competitors to bulk power markets in the future.

In addition, we are imposing short-term conditions designed to ameliorate the exercise of monopoly power by the merged company during a five-year transitional period necessary until the long-term conditions can become effective. During the transition period, a portion of the merged company's transmission system will be set aside for use by third parties. This short-term allocation will inhibit the merged company's ability to foreclose competitors who wish to use its transmission system.

a. The Applicants' Proposed Wheeling Conditions

The Applicants' proposed wheeling policy states, *inter alia*, that the merged company would provide firm wheeling service through its transmission system on a case-by-case basis. 159/ The Applicants state that, in general, wheeling will be allowed if it does not jeopardize the merged company's system or impair reliable service and if the merged company is allowed to price the service so as to recover its embedded costs plus lost economic benefits (opportunity costs). 160/

We find this policy to be inadequate. 161/ First, the Applicants' proposed wheeling policy is not likely to result in meaningful access to the merged company's transmission system. Moreover, nothing contained in the wheeling policy proposed by Applicants would prevent them from unduly preferring their own higher-cost generation over competitors' cheaper alternatives.

158/ "Utilities" shall not include Qualifying Facilities as defined in section 292.101(b)(1) of the Commission's regulations. 18 C.F.R. § 292.101(b)(1) (1988).

159/ Applicants Brief on Exceptions at 47.

160/ *Id*. at 47-48.

161/ *See* 43 FERC at 65,344-47.

Second, while opportunity cost pricing may, under certain conditions, provide a useful measure of the value of scarce transmission resources, the Applicants' proposal for determining opportunity costs is overly vague and possibly unworkable. Further, we agree with various intervenors that opportunity cost pricing, as proposed by Applicants, would simply provide a mechanism for the merged entity to collect monopoly rents associated with a scarce or constrained resource (the merged transmission system). If allowed to retain the monopoly profits associated with these "congestion costs", the Applicants would have no incentive to alleviate the congestion. As noted by staff witness Mosher,

> the merging companies have definite incentives to withhold capacity from the market . . . to drive the price up, provided that such actions will not bring additional capacity into the market, or lead to regulatory sanctions. . . . If realistic alternatives are few, then congestion pricing, combined with the control of the capacity available . . . is very likely to result in the exercise of monopoly power. 162/

Finally, the case-by-case approach proposed by the Applicants for determining whether the merged company will provide firm wheeling will likely result in numerous Commission proceedings under section 206 of the FPA to determine whether wheeling was improperly denied.

In contrast, the long-term obligation that we are imposing is designed to remedy the likely anticompetitive effects of the merger by requiring that competitors receive non-discriminatory access to the bottleneck transmission facilities of the merged company. Furthermore, pricing for such service will be at a cost-based rate. 163/ Finally, it is hoped that the long-term

---

162/ Ex. 100 at 22.

163/ "Cost-based" in not intended to suggest rates that are limited to embedded cost. However, we do not contemplate including opportunity costs in such rates, and in any event, opportunity cost pricing as proposed by Applicants will not be permitted. Where additional capacity is needed to meet a request, rates may be designed to specifically assign the cost of that capacity addition to the party requesting service. We do not preclude the possibility that such costs will subsequently be allocated to other beneficiaries of the additional capacity.

obligation to provide non-discriminatory transmission service described below will simplify and streamline the administrative process.

The short-term conditions set forth a procedure to identify a portion of the merged company's transmission system that will be made available to utilities as an interim measure. The short-term conditions are designed to remain in effect until the merged company is required to meet its long-term obligation to satisfy all bona fide firm wholesale wheeling requests. This set-aside and allocation approach, unlike the Applicants' proposal, ensures meaningful access to competitors on the merged company's transmission system during the transition period.

b. Conditions to be Imposed

i. Transition Period Conditions

(a). Access to Existing Capacity

As part of its compliance filing in this proceeding, the merged company shall identify that portion of its total transfer capacity that could be used for firm deliveries by wheeling customers at particular points of delivery. The portion so identified will be designated "Remaining Existing Capacity." Remaining Existing Capacity shall equal the difference between the merged company's total transmission capacity and that capacity needed to serve both its native load customers and customers under firm contracts entered into prior to the merger application. After the Remaining Existing Capacity is identified, the merged company shall make such capacity available to requesting utilities as quickly as possible. 164/

Remaining Existing Capacity shall be divided into three tiers in the following percentages: Transmission Dependent Utilities 165/ shall have a right to 20% of the Remaining Existing Capacity (Tier 1); unaffiliated utilities connected to the merged company to the north and to the merged company's

---

164/ Various intervenors have proposed setting aside some of the merged company's transmission capacity for use by others. See, e.g. United Mineworkers, et al. Brief Opposing Exceptions, Append. A.

165/ Transmission Dependent Utilities are those utilities that are dependent on the merged company for transmission access to their load or resources, and includes Deseret Generation and Transmission Co-operative, Utah Associated Municipal Power Systems, Inc. and its present members, and the present members of the Utah Municipal Power Association.

eastern division shall have a right to 30% of the Remaining Excess Capacity (Tier 2); and the remaining 50% of such capacity will be available to any utility, including the merged company (Tier 3).

Within ninety days following the time the merged company announces that the Remaining Existing Capacity is available, eligible utilities shall file with the merged company all executed contracts which they have negotiated for firm capacity and energy which would utilize the Remaining Existing Capacity. For each respective tier, each entity announcing an executed contract shall be designated a "Qualifying Entity" for purposes of the allocation process.

If, at the end of the ninety-day period, the transmission capacity required to meet the obligations under such executed contracts exceeds the Remaining Existing Capacity in any particular tier, the merged company shall allocate the Remaining Existing Capacity among the Qualifying Entities in proportion to the contract demands of the executed contracts.

In Tier 1 and Tier 2, the allocation of transmission capacity to the Qualifying Entity shall continue for the length of the underlying contract. Regardless of the length of contracts in Tier 3, the allocation of capacity in that tier shall not exceed five years from the date the capacity becomes available. 166/

If, at the end of the ninety day period, the transmission capacity required to meet the obligation under such executed contracts is less than the Remaining Existing Capacity in Tier 1 or Tier 2, subsequent wholesale transmission requests in such tier will be honored on a first-come, first-served basis. If, after one year, the Remaining Excess Capacity is still undersubscribed in Tier 1 or Tier 2, any unused capacity shall revert to the merged company for use in Tier 3.

If, in Tier 3, at the end of the ninety day period, the transmission capacity required to meet the obligation under executed contracts is less than the Remaining Existing Capacity, then Trial Staff's revised wheeling policy 167/ ~~with certain~~
Sections IV A, D and E of the*

166/ We recognize that some utilities may require firm transmission capacity for a term longer than five years. Pursuant to the merged company's obligation to serve, described below, such utilities may request that capacity be provided to supplement its share of capacity obtained through the short-term allocation.

167/ Trial Staff's revised wheeling policy is attached hereto as Appendix A.

* See Order Clarifying Opinion Issued October 28, 1988)

~~changes proposed by the Utah Associated Municipal Power Systems~~ * will apply to third party requests for wholesale transmission service for the remainder of the five year period.

For the first and second tiers, the merged company shall be compensated for wheeling service at a rate to be determined in a section 205 filing following the designation of Qualifying Entities. For a period of five years following the effective date of the proposed rates, such rates shall be based on the merged company's embedded costs. After five years, the Commission may consider costing methods other than embedded cost, consistent with general transmission pricing policy. However, opportunity cost pricing as proposed by the Applicants will not be permitted.

Rates in Tier 3 will also be determined in a section 205 filing following designation of the Qualifying Entities. Those rates shall be cost-based, but not necessarily limited to embedded costs. Again, opportunity cost pricing as proposed by the Applicants will not be permitted. The merged company will make available for ratepayer relief funds it collects in excess of embedded cost during the transition period, with allocation of the excess fund to be determined in a rate case under section 205.

Firm wheeling would also be required within those "integrated service areas" as described by the Applicants 168/ within which they acknowledge that the merged company will be generally unconstrained in its ability to respond to requests to transmit power in the quantities that can be reasonably expected. 169/ When both the source and the point of delivery are within one its integrated service areas, the Applicants have agreed to provide wheeling service as a matter of course to a requesting utility unless the amount of power to be wheeled exceeds the engineering limitations of the merged company's system. To the extent additions to the merged company's transmission facilities are necessary to provide firm wheeling within an integrated service area and are technically feasible, the merged company shall construct such additions if sufficient lead time is provided and a contract term is agreed upon that is adequate to economically support the facilities required. We believe that five years is a

---

168/ These integrated service areas shall be subject to revision based upon subsequent changes to the physical capabilities and contractual limitations under which the merged company operates its transmission system. Thus, they shall be expanded as the merged company's transmission system is upgraded.

169/ Applicants Brief on Exceptions, Appendix A.

reasonable length of time within which to construct these additional facilities.

Any agreement regarding the transmission capacity obtained through the allocation process shall not contain any provision restraining whatever rights exist under the FPA to re-sell or re-assign that capacity.

(b) Participation by Other Utilities in Transmission Construction

We are adopting the trial staff's revised conditions, with minor modifications proposed by the Utah Associated Municipal Power System's, regarding participation by third parties in transmission capacity additions by the merged company. 170/

With respect to the construction of transmission facilities of voltage levels of 345 kV or higher and subject to applicable state regulatory approval, the merged company shall afford other utilities the opportunity to participate in the project, provided that: (a) the potential participants have a legitimate interest or service-related purpose in such participation, (b) the joint participation will not unreasonably delay the project or render it impractical for the merged company as a matter of economics or engineering, (c) the potential participants are prepared to equitably share in the costs and benefits of the project, considering the cost of the project, the value of the merged company's existing investment in related facilities and the benefits to be derived by each party, and (d) the utility requesting the opportunity to participate has not unreasonably denied the merged company's participation in comparable projects.

With respect to Transmission Dependent Utilities, where the merged company initiates transmission capacity expansion, it shall agree to joint participation in upgrades, improvements or additions to backbone transmission (138 kV or higher), interconnections and substation facilities of the division of the merged company that serves them so that such utilities may, subject to applicable state regulatory approval, reasonably participate in the project, provided that: (a) the potential participants have a legitimate interest or service-related purpose in such participation, (b) the joint participation will not unreasonably delay the project or render it impractical for the merged company as a matter of economics or engineering and (c) the potential participants are prepared to equitably share in the costs and benefits of the project considering the cost of the

---

170/ Utah Associated Municipal Power System Brief on Exceptions.

project, the value of the merged company's existing investment in related facilities and the benefits to be derived by each party.

When requested by a Transmission Dependent Utility, the merged company shall not unreasonably withhold its consent for upgrades, improvements or additions to interconnections, transmission and substation facilities located within an Integrated Service Area, and subject to applicable state regulatory approval, provided that: (a) the requesting utility pays for the upgrades, improvements or additions, (b) the upgrades, improvements or additions are required to serve the retail or wholesale customers of the Transmission Dependent Utility, (c) the upgrades, improvements or additions are consistent with the merged company's engineering and construction standards, and (d) the parties are able to agree upon a fair allocation among them, or in the absence of such agreement, the requesting utility is prepared to equitably allocate the additional resulting transfer capability considering the cost of the project and the value of the merged company's existing investment in related facilities.

ii. Long-Term Obligation to Serve

The merged company will be required to provide firm 171/ wholesale transmission service to any electric utility requesting it at a cost-based rate. The merged company will be required to meet all bona fide requests for service either by using its existing capacity or by building new facilities. The ultimate decision whether to build would remain with the merged company. In either event, the merged company will be obligated to plan and construct its system to accommodate all such requests. However, no requests for service need be fulfilled if doing so would interfere or disrupt the merged company's transmission obligations imposed during the transition period described in section i. above.

The company will be required to use due diligence to meet all bona fide requests for service by electric utilities. We recognize, of course, that a reasonable period of time will be necessary to meet requests for which capacity must be constructed. Once a request for service is made, however, in no event will the company be allowed more than five years to provide such service. We believe that five years is a reasonable maximum period of time for the merged company to obtain sufficient additional transmission capacity (by improving and upgrading the existing transmission system and/or constructing new capacity) satisfy all bona fide requests by other utilities for long-term firm wheeling, as well as its own needs. The five-year limit

171/ "Firm" can include off-peak service, as well as service that has some degree of interruptibility.

would begin on the date of each request, although the merged company would be required to use due diligence to provide the service sooner than five years, whenever possible.

Following the five-year period transition period, discussed above, the merged company's obligation to serve shall include a requirement that the merged company reduce its own off-system transactions 172/ to the extent necessary to meet all requests for transmission service by electric utilities.

Any entity whose request is not met with due diligence (or, in any event, after five years) may institute a complaint proceeding before the Commission. A complainant must show that: (1) it made a request for service that has not been met; (2) it was willing to pay the full cost of the service; and (3) it has proffered sufficient security such that the merged company would not be at financial risk due to non-performance by the requesting party. Notice of the complaint will be published in the Federal Register, and others claiming that their requests have not been met will be permitted to have their complaint consolidated with the original proceeding.

If a complaint is filed less than five years from the date of a request for transmission service, the complainant must also show that the merged company could have provided the service had the merged company used due diligence. If a complaint is filed five years or more from the date of the request, no showing with regard to due diligence will be required. Similarly, a showing of due diligence on the part of the merged company would not constitute a defense in such a case. However, no complaint regarding the long-term service obligation will be entertained during the five-year transition period. 173/

If a complainant shows that the merged company has failed to meet its service obligation, as set forth above, the merged company will be required to reduce its use of transmission capacity for off-system transactions to the extent necessary to

---

172/ Off-system purchases of power needed to provide capacity to the merged company's native load customers, (including captive wholesale customers) are not subject to this provision. The merged company may include five-year projections for native load growth during the term of the request. Customers under firm contracts entered into prior to the merger agreement are also not subject to this provision.

173/ Complaints regarding access to existing capacity during the transition period, described in section 4(b)(i) above, will be permitted at any time.

meet all requests for firm transmission service that have been shown to be unsatisfied.

Any agreement regarding the transmission capacity obtained through the merged company's obligation to serve shall not contain any provision restraining whatever rights exist under the FPA to re-assign that capacity. If transmission capacity is resold to the merged company, to the extent that it is not needed to serve native load it must be made available to meet its obligation to serve other firm wholesale transmission requests.

iii. Non-firm Wheeling

To the extent that the merged company negotiates non-firm wheeling transactions with other utilities, rates for such service shall be based on an equal three-way sharing of the benefits in accordance with trial staff's revised wheeling policy. Each party to this rate shall agree to make available to the other parties such incremental cost information as is reasonably necessary to estimate the total savings to be shared.

c. Compliance Filing

As part of its compliance filing, the merged company shall file as a tariff each of conditions set forth above.

D. The Effect on Regulation

One of the issues set for hearing was the potential for impairment of effective regulation. The administrative law judge found that both the size of the merged entity as well as the number of states in which it would be operating would create very difficult interjurisdictional problems. The judge also found that there would be "serious difficulties inherent in developing and implementing cost allocation principles for inter-divisional cost allocations." 174/

While admitting that the merger may potentially create some additional regulatory burden, the Applicants except to the finding that the merger would impair effective regulation. 175/ Both the Utah Division of Public Utilities and the Public Service Commission of Wyoming strongly except to the Initial Decision and urge this Commission to recognize the ability of the seven affected states to effectively regulate the multi-jurisdictional activities of Pacificorp Oregon. Trial staff argues that it would be possible to effectively regulate the merged entity

---

174/ 43 FERC at 65,348.

175/ Applicants Brief on Exceptions at 83-85.

through appropriate rate conditions. 176/ We agree, and find that appropriate conditions exist which, if accepted by the Applicants, would enable this Commission and the state commissions to effectively regulate the merged entity. These conditions are discussed below in the section on the effect on rates and operating costs.

The proposed merger would affect Commission jurisdiction in two principal ways. 177/ First, because the merged entity would be incorporated in the State of Oregon, this Commission would not regulate its securities issuances. 178/ That regulatory function would vest in the Oregon Commission. 179/ Second, and more importantly for purposes of our consideration, PP&L and UP&L would cease to be separate legal or jurisdictional entities. Because of the divisional structure that Pacificorp has elected to pursue, the jurisdictional public utility would be the merged company -- not the operating divisions. As noted in the testimony of staff witness, Jonathan L. Siems:

> After the merger, it appears that the pricing of power transfer transactions between the two companies -- which would become two "divisions" of one company -- may no longer be directly governed by existing FERC rate schedules, because such transactions technically will be internal to the merged company. 180/

While this Commission would continue to regulate the wholesale rates of Pacificorp Oregon, intra-company transactions by and

---

176/ Trial Staff Brief on Exceptions, pp. 13-25.

177/ We note that the merger application has been approved by each of the seven states in which Pacificorp Oregon would be conducting business. The state commissions have attached various allocation and rate conditions to their approval. These include the Applicants' agreement not to seek retail rate increases for a certain period of time following the merger, and their agreement to reduce certain retail rates. The Utah Public Service Commission, while having approved the merger, has not yet issued an order explaining its rationale or describing any conditions it may attach to its approval.

178/ 16 U.S.C. § 824c(f) (1982).

179/ See Exhibit 3 at 20.

180/ Ex. 102 at 8.

between the two divisions would no longer be "sales for resale" and therefore will not be subject to a rate schedule or tariff on file with this Commission. 181/

In its Brief on Exceptions, the Utah Division of Public Utilities characterizes the proposed divisional organization as maintaining the current Federal/state regulatory relationship. 182/ However, pre-merger, Commission determinations regarding rates for transactions between UP&L and PP&L would preempt contrary state determinations. 183/ Following the merger, wholesale rate determinations by this Commission based upon a particular assignment or allocation of costs between the two divisions would not preempt a state retail rate determination based upon a contrary assignment or allocation. The seven affected states would be free to adopt different (and potentially inconsistent) cost allocation schemes. As correctly noted by the Utah Division of Public Utilities:

> [A] risk exists that jurisdictions may allocate costs on a different basis, and that 100 percent of the costs may not be recovered. . . . Each jurisdiction will have the right to allocate costs, and the utility will continue to have a risk that assets will go unrecovered. 184/

We find this to be a risk that the Applicants have knowingly assumed in proposing a divisional operating structure and we do not perceive the possibility that Pacificorp Oregon may under-recover its costs in retail proceedings as impairing the effectiveness of Federal regulation.

Our concern as a regulatory body is that Pacificorp Oregon not be permitted to use its proposed divisional structure as a mechanism for over-recovery of wholesale costs. Consequently, we intend to preserve the Applicants' obligation in future rate cases to give full and complete access to the books and records

---

181/ 16 U.S.C. 824(d) (1982). We note that if Pacificorp had chosen to reorganize as a holding company and retained PP&L and UP&L as operating subsidiaries, PP&L and UP&L would have remained jurisdictional entities and transactions between the two operating subsidiaries would have remained jurisdictional before this Commission.

182/ Utah Division of Public Utilities Brief on Exceptions at 13.

183/ Nantahala Power & Light Company v. Thornburg, 476 U.S. 953 (1986).

184/ Utah Division of Public Utilities Brief on Exceptions at 19.

of each of its divisions. Furthermore, we will order Pacificorp Oregon to maintain a clearly defined audit trail for transactions between divisions.

The judge found that:

> Regulators will virtually be at the mercy of the merged company in determining inter-company cost allocations and thus in measuring earnings levels and determining rates. (Ex. 296 at 3). Moreover, Applicants' offered "audit trails" will not solve these problems. Contrary to the suggestion of Applicants, audit trails might permit the unraveling of the merged company's preferred allocation method, but they will not necessarily allow the use of alternative methods preferred by state or federal regulators. Adequate records might simply be unavailable to implement any such alternative methodology. 185/

We disagree. Ultimately, state and Federal regulatory commissions have to approve the rates that Pacificorp can charge, respectively, to retail and wholesale ratepayers. To the extent that Pacificorp's proposed allocation methodology is unsupported, flawed, or otherwise unacceptable, this Commission may deny the recovery of costs. Therefore, failure to maintain and provide an adequate audit trail for this Commission to "unravel" intracompany allocations would put the merged entity at further risk of recovering less than 100 percent of its costs of providing service. We believe this is an adequate safeguard against Pacificorp Oregon submitting less than complete cost of service data to support interdivisional allocations of costs and revenues.

Finally, as noted above, section 203(b) provides that "the Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate." 186/ Thus, we view our conditioning authority under section 203(b) as continuing in nature. Therefore, should an interested party come before the Commission in the future with a showing that the merged entity operating in such a manner as to impair the effectiveness of regulation, or if the Commission *sua sponte* reached this conclusion, we retain the statutory authority to further

---

185/ 43 FERC at 65,350-51.

186/ 16 U.S.C. § 824b(b) (1982).

condition the merger so as to render it consistent with the public interest.

E. The Effect on Operating Costs and Rate Levels

In Commonwealth Edison, the Commission stated:

> [I]t is our responsibility under the Federal Power Act in determining whether a merger is consistent with the public interest to consider what effect the fact of merger would have on rate levels or on state regulation of retail rate design. 187/

Thus, in our order setting the merger application for hearing, we required that the Applicants submit:

> data comparing the operating costs of each company, as well as whether the Applicants intend to file future wholesale rates on a consolidated or divisional basis. 188/

The presiding judge faulted the Applicants for providing inadequate cost support to enable the Commission to properly compare the operating costs of each company before the merger with the operating costs of the combined entity after the merger. 189 In so doing, the judge misconstrued the nature of our inquiry with regard to rates under section 203 vis a vis that conducted in the course of proceedings under sections 205 and 206.

Under section 203, our focus with regard to rates is upon whether the proposed combination is "likely to effect unnecessary rate increases or inhibit possible rate reductions." 190/ In setting the merger application for hearing, it was not our intention to require comprehensive cost of service documentation or to develop wholesale rates in the context of a proceeding under section 203. Instead, we anticipated a more generalized inquiry and cross-examination regarding the types of savings and efficiencies that might be achieved through merger. In the event that the merger application were to be finally consummated, a rate proceeding under section 205 may then be held to determine

---

187/ 36 FPC at 938.

188/ 41 FERC at 61,754.

189/ 43 FERC at 65,334.

190/ 36 FPC at 938, citing Western Massachusetts Electric Co., 3 FPC 345 (1942), and Northwestern Electric Co., 5 FPC 312 (1946).

just and reasonable rates for the provision of wholesale electric service by the newly-merged entity. As we will discuss more fully below, given the magnitude of merger-related cost savings projected by the Applicants, we intend to establish rate procedures to ensure that the merger-related savings are translated into lower wholesale rates as quickly as possible.

We recognize that deferring the actual determination of wholesale rate levels to a subsequent rate proceeding injects a degree of uncertainty into the merger approval process. That uncertainty stems from the fact that the outcome of a rate proceeding may affect the desirability of the merger -- from the perspective of the Applicants as well as other affected parties. In our view, some uncertainty is unavoidable if we are to deal with merger applications in a timely and efficient manner. We recognize that it would be impossible to anticipate every possible rate question that may occur as a result of this merger. However, to the extent possible, we will provide direction and guidance regarding the likely disposition of identifiable rate issues that may result from the merger (e.g., divisional pricing versus single system or rolled-in pricing) as well as a workable framework for the administration of future rate proceedings.

1. Merger Benefits

The Initial Decision discusses the effect on operating costs and rate levels from the standpoint of the savings or merger benefits cited by the Applicants in support of the proposed merger. We find that in rejecting most of the Applicants' claimed merger benefits, the judge's standard of review was overly rigid. He concluded that:

> . . . the evidence demonstrates that nearly all of the possible benefits indicated by Applicants are either speculative, attainable absent the merger, or pecuniary benefits (i.e. gained by Applicants at the expense of others such that the public interest is not affected). 191/

This conclusion should be viewed, however, in the context of the judge's finding that the Commission lacks the authority to condition the merger in such a manner sufficient to alleviate the likely anticompetitive effects. Since we are imposing conditions designed to restrain the merged company's market power and avoid anticompetitive effects that may result from the merger, the claimed benefits should be evaluated in the context of those restraints.

191/ 43 FERC at 65,335.

In evaluating the effect of the merger on operating costs and rate levels, it is necessary to consider all of the benefits (and costs) likely to result. The possibility of achieving a particular benefit through a contractual arrangement does not diminish the cost savings associated with that benefit. The relevant question is whether the benefits of a merger will outweigh its costs such that the current and future cost of providing electric service will be less.

The Applicants have projected merger-related savings of approximately $48 million in 1988 increasing to $158 million in 1992. They estimate that total benefits for the five-year period following the merger will exceed $505 million. 192/ Even if we discount certain claims by the Applicants that appear overly speculative or extend too far into the future to be meaningful, we are still left with substantial savings that may be achieved as a result of merger. The Applicants have projected that significant cost reductions will flow from the elimination or consolidation of duplicative functions when the two companies are combined. 193/ More importantly, in the area of power supply costs the Applicants project that considerable savings are possible due to the diversity in peak demands on the two systems. Because the UP&L system peaks in summer and the PP&L system peaks in the winter, the combined system can be dispatched more efficiently and reserve requirements for the combined entity will be reduced. 194/ The Applicants estimate that the reduced capacity requirements will enable Pacificorp Oregon to defer construction of new capacity until approximately 1997 or 1998. 195/ Furthermore, the merger will provide a better mix of generating resources and power supply options which will enable Pacificorp Oregon to take advantage of fuel cost diversities and to displace higher cost purchased power expenses. 196/

We agree with various intervenors that a major portion of the savings claimed from combining administrative functions have not been substantiated. 197/ However, we are convinced, as trial staff argues, that the probable merger benefits nonetheless add

---

192/ Ex. 4, Sch. 3.

193/ Ex. 3 at 10-11.

194/ Ex. 8 at 19-20; Ex. 9, Schs. 13 and 14; and Ex. 10 at 4-16.

195/ Ex. 8 at 20-28 and Ex. 9, Schs. 16, 17, and 21.

196/ Ex. 3 at 9; Ex. 8 at 13; and Ex. 9, Schs. 5-9.

197/ *See*, *e.g.*, Nucor Steel Brief Opposing Exceptions at 42-45.

up to substantially more than the costs of the merger. 198/ We further agree that the power supply benefits alone would likely be greater than the costs of the merger. 199/

2. Single System Pricing

Following the merger, the Applicants have proposed to design separate rates for the UP&L Division and the PP&L Division. The Applicants have specifically requested that the Commission endorse divisional pricing in the present order "at least for a reasonable period of time during which the costs of the two divisions will tend to converge." 200/

However, as correctly noted by trial staff and certain intervenors, Commission precedent clearly supports single system pricing except in certain limited situations. 201/ As Sierra Pacific and Nevada Power Company point out:

> The principal reason behind adoption of [rolled-in costing] is that an integrated system is designed to achieve maximum efficiency and reliability at a minimum cost on a system wide basis. Implicit in this theory is the assumption that all customers . . . receive the benefits that are inherent in such an integrated system. 202/

For purposes of wholesale ratemaking, the presumption is that single system pricing is appropriate unless the utility can demonstrate a valid basis for departing from that presumption. We note further that single system pricing would solve many of the problems identified by the judge with regard to the Applicants' divisional pricing proposal. 203/

198/ Trial staff Brief on Exceptions at 12.

199/ Id.

200/ Applicants Brief on Exceptions at 71.

201/ See, e.g., Trial staff Brief on Exceptions at 22, citing Sierra Pacific Power Co. v. FERC, 793 F.2d 1086 (9th Cir. 1986); Sierra Pacific and Nevada Power Company Brief Opposing Exceptions at 11-12.

202/ Sierra Pacific and Nevada Power Company Brief Opposing Exceptions at 12, quoting Otter Tail Power Co., Opinion No. 93, 12 FERC ¶ 61,169 at 61,420 (1980).

203/ Trial Staff Brief on Exceptions at 22.

Obviously, when a merger is proposed between utilities with disparate costs, single system pricing may work to the advantage of ratepayers of one utility and to the disadvantage of ratepayers of the other utility. In evaluating whether a proposed merger is consistent with the public interest, the Commission's focus must be upon the overall or net impact upon rates. To insist upon immediate single system pricing might discourage certain mergers where efficiency gains are possible, thereby depriving ratepayers of substantial savings. Furthermore, there may be other valid reasons to allow some flexibility for purposes of pricing generation and transmission service (e.g., to more accurately reflect regional differences in the cost of production). Therefore, the Commission is willing to countenance an initial level of rate disparity between divisions to permit Pacificorp Oregon to gain some experience operating as a merged entity, to ameliorate possible rate shock to existing wholesale PP&L ratepayers, and to allow the system time to become more fully integrated.

In support of the merger, the Applicants have stated that Pacificorp Oregon will be operated as a single integrated system.

> After the merger, the companies' generation and transmission resources will be planned and operated on a single-utility basis (Ex. 8, pp. 28-30; Ex. 207, p. 45). The merger 'will create an even more integrated system than before,' which will be fully integrated, and 'will operate in an interconnected and coordinated fashion' (Ex. 8, p. 30). The consolidation will allow the Merged Company to dispatch its most economic generating units (Ex. 8, p. 31). 204/

Furthermore, the Applicants have stated that Pacificorp Oregon will move naturally towards single system pricing within the next fifteen to twenty years. 205/ However, we can find no evidence in the record that would support fifteen to twenty years as a reasonable period of time to phase in single system pricing. 206/ Indeed, the only basis cited by Applicants in support of their

---

204/ Applicants Initial Brief at 7.

205/ Tr. 1366, 1369.

206/ Note that the term "phase-in" does not connote any deferr revenue recovery and does not involve FASB 92 considerat: regarding the appropriate phase-in period. See Arkansas Power & Light Company, 41 FERC ¶ 61,034 (1987) and Notice Inquiry, Accounting for Phase-In Plans, 53 Fed. Reg. 24, (1988).

proposed divisional pricing concept is that "uniform prices would result in substantial price increases for Pacific customers, perhaps in the order of 15 to 20%." 207/ We are unwilling to adopt a particular phase-in period based upon the record developed in a proceeding under section 203. Consequently, we will order Pacificorp Oregon to phase in single system pricing and set the determination of a reasonable phase-in period for hearing as part of the first rate proceeding ordered following the merger.

We wish to stress that allowing divisional pricing for Pacificorp Oregon is an exception to our general policy of requiring rolled-in pricing of generation and transmission and we are in no way overruling that general policy. Our approval of the proposed merger is not intended to encourage divisional reorganizations of existing utilities in order to assign specific generation or transmission resources to specific customers. Our willingness to accept divisional pricing for a limited period of time is expressly contingent upon Pacificorp Oregon submitting detailed cost support for the allocation of costs and revenues between the two divisions in the upcoming rate proceedings as ordered below.

3. Interjurisdictional/Interdivisional Allocation Process

As noted by the presiding judge, the consensus process proposed by Applicants to implement interdivisional and interjurisdictional cost allocations is seriously flawed. The Applicants have admitted that "interjurisdictional and intercompany allocations are among the most complex and controversial areas of utility regulation," and it "may well take several years of discussions and actual experience before all affected parties understand the issues involved and consensus emerges regarding appropriate cost allocation for the

---

207/ Applicants Brief Opposing Exceptions at 15. As proof of this statement, the Applicants derived rates for each division as well as for the combined post-merger entity by dividing calendar year 1987 revenues by calendar year 1987 MWH sales. (Id., Appendix A.) However, this is not enlightening because it assumes that the revenues of the combined single entity will be equal to the sum of the revenues collected by UP&L and PP&L before the merger. In light of the substantial cost savings the Applicants have proffered in support of the merger application, there is no reason to assume that either revenues or sales from 1987 accurately reflect what revenue or sales figures will be for the merged entity.

consolidated entity." 208/ While we are sympathetic to the Applicants' desire for uniformity and consistency between the various jurisdictions, we cannot allow the consensus process to delay the implementation of lower wholesale rates that fully reflect the benefits of the merger. The Applicants have stated that:

> The objective is to ensure, as we have with our existing allocation system, that there is an opportunity for 100 percent cost collection, and the objective here would be that we are not giving away more than 100 percent of the merger benefits. 209/

In that regard, we note that the Applicants have failed to establish that the selective rate reductions and moratoriums offered before the various state public utility commissions and at this Commission bear any relationship to the ultimate cost the merged entity will incur to provide electric service. We have no way of knowing if PP&L's current wholesale rates will be cost-justified after the merger nor do we have any indication that the cost of providing service to UP&L customers will decrease by two percent after the merger. At best, we can accept the (pre-merger) rates that Pacificorp Oregon proposes to charge its wholesale customers on a temporary or interim basis following the merger. This will provide the newly-merged entity time to fully prepare cost-of-service studies to support just and reasonable wholesale rates.

4. Fuel Adjustment Clause

Initially, it will be necessary for the new jurisdictional entity, Pacificorp Oregon, to file a Notice of Succession in accordance with the Commission's regulations in order to take over operating control of the jurisdictional facilities of UP&L and PP&L -- including all rate schedules that are currently on file. 210/ As noted by Sierra Pacific, when Pacificorp Oregon, as the new jurisdictional entity, adopts UP&L's existing fuel adjustment clause, the fuel clause by its own terms can no longer reflect the fuel costs and kilowatthour sales of UP&L, but must reflect the total fuel costs and total kilowatthour sales of Pacificorp Oregon.

> Consistent with Section 35.14 of the Commission's regulations, UP&L's rate

---

208/ Ex. 3 at 18; Tr. 1276.

209/ Tr. 1185.

210/ 18 C.F.R. § 35.16 (1988)

> schedule provides fuel costs to be calculated based on the fuel consumed within the "utility's own plants". After the merger, generation plants will no longer be owned by UP&L and PP&L, but will be owned by the merged corporation, Pacificorp. Tr. 1335. Hence, per Commission regulations, Pacificorp must pass through fuel costs of its generation. This interpretation of Commission regulations is fully consistent with Commission decisions regulating gas utilities in which the Commission has directed merged companies to calculate gas costs as the combined or rolled-in costs of the two formerly separate companies. [Citing Consolidated Natural Gas Supply Corp., Opinion No. 703, 52 FPC 454 (1974) and National Fuel Gas Supply Corp., 7 FERC ¶ 61,317 (1979).] For the same reasons, the purchased power costs flowed through the fuel-clause should be calculated on a single system basis. 211/

Accordingly, from the date the Notice of Succession is accepted by the Commission, UP&L's current fuel adjustment clause must operate on a total company basis. This will fully protect UP&L's existing wholesale ratepayers from possible overcharges, is consistent with the Commission's fuel clause regulations, and will defer allocation questions until the first full rate proceeding ordered following the merger. As part of that proceeding, Pacificorp Oregon is free to propose the elimination of the fuel adjustment clause and the collection of fuel costs through separate base energy rates for each division.

5. Refund Liability

Where a corporate reorganization or merger generates significant cost savings, there is very little incentive for the new utility to come forward with new rates that fully reflect those savings. Under the Commission's regulations, if the merger is approved the surviving entity would be required to file a Notice of Succession pursuant to 18 C.F.R. § 35.16 (1988). At that time, the surviving entity could either seek to continue the existing rates or could file a rate change application simultaneously with its notice of succession. 212/ In either

---

211/ Sierra Pacific and Nevada Power Company Initial Brief at [illegible]

212/ However, if a rate decrease were filed, under section 205 of the FPA there is no statutory refund obligation.
(continued...)

event, the Commission cannot make a finding under section 203 that the merger is consistent with the public interest without some assurance that the post-merger wholesale rates will not be excessive. 213/ In the absence of such assurance, the Commission would be in the anomalous situation of approving a merger that could result in the collection of substantial excess revenues without according any refund protection to the affected wholesale customers. We agree with the observation by Sierra Pacific witness Smith:

> [A] commitment to a rate filing without refund floor is required, otherwise the effective date of reduced rate levels that properly reflect the cost to serve . . . wholesale customers as of the date of the merger could be delayed unjustifiably for a substantial period of time. 214/

Therefore, as we will describe more fully below, we intend to condition our approval of the merger under section 203 upon Pacificorp Oregon making three separate section 205 rate change applications to ensure that the cost savings that have been projected in support of the merger are fully reflected in wholesale rates. The burden of proof in these applications shall be upon Pacificorp Oregon. Furthermore, under the rate procedures we intend to establish, Pacificorp Oregon will be obligated to make refunds, back to the effective date of each of the three rate change applications, that reflect the rate level ultimately determined to be just and reasonable.

6. Rate Conditions

212/(...continued)
16 U.S.C. § 824d(e) (1982). Should it ultimately be determined that the proposed rates are unjust and unreasonable, a new rate can only be imposed prospectively, after the Commission establishes the just and reasonable rate to be thereafter observed.

213/ In a period of declining costs, it is to the utility's advantage to understate cost savings and overstate proposed rates (or to make no rate change application at all and wait until a complaint proceeding is filed under section 206 of the FPA). However, we note that the recently enacted Regulatory Fairness Act, Pub. L. No. 100-473 (1988), provides some refund protection where rates are found to be unjust and unreasonable.

214/ Ex. 298 at 5.

In their Initial Brief, the Applicants have included a number of conditions 215/ which relate to the effect of the merger on rates. With respect to the UP&L Division, the Applicants have agreed to reduce wholesale rates by two percent and to freeze the fuel adjustment clause at 13 mills, subject to refund. The Applicants have also agreed to file a cost-of-service study for UP&L Division requirements service equivalent to Statement BK 216/ within nine months of the effective date of the merger, and annually thereafter upon the request of the Commission. And, within one year, the Applicants are willing to file a cost-of-service study for UP&L Division wheeling service. We note that these various cost-of-service filings are informational only. That is, the merged company will not file for a decrease in rates (beyond the initial two percent reduction) until after the informational filing is processed and a determination is made that a rate decrease is justified. The Applicants claim that:

> [a] full rate filing is necessarily a major undertaking under 18 C.F.R. § 35.13 and should be required only if a cost of service shows a rate decrease to be justified. 217/

With regard to the PP&L Division, the Applicants have undertaken a general commitment not to increase wholesale rates until 1992. The Applicants do not intend to make any filing to support the continuation of PP&L's current wholesale rates. 218/

Trial staff has suggested a procedure under which the Commission would (1) accept the Applicants' offer to cap the wholesale rates of the PP&L Division until April 1992, 219/ (2) require a complete rate case filing by the UP&L Division for both wholesale requirements service as well as wheeling service within six months after the merger is approved, and annually

---

215/ These conditions have been proposed by the Applicants "without conceding either the authority of the Commission t impose such conditions or the adequacy of the record to justify such conditions." Applicants Initial Brief, Appendix B.

216/ 18 C.F.R. § 35.13(h)(36) (1988).

217/ Applicants Reply Brief at 15-16.

218/ Id. at 18.

219/ The Applicants assert that PP&L's rates are already capp... However, the presiding judge correctly found that only o... of PP&L's five wholesale rates currently on file is capp... 43 FERC at 65,356.

thereafter until 1992, (3) require a concurrent informational filing by the PP&L Division, and (4) require the UP&L Division to submit a 2% base rate reduction and propose an interim FAC allocation procedure within 30 days after the merger is approved. 22 Trial staff also endorsed a proposal by Sierra Pacific witness Smith that the <u>first</u> rate filing by the UP&L Division be made without a refund floor.

We have a number of concerns regarding the Applicants' unsupported offer to reduce certain wholesale customers' rates by two percent and to freeze the rates of other wholesale customers at their current levels for several years. We are particularly concerned that the various informational filings proposed by the Applicants that are "similar in format" to the cost support required in a formal rate application, but which will precede such rate applications, are merely devices that will unnecessarily delay implementation of lower wholesale rates. And while we support the general thrust of trial staff's proposed rate procedures, we feel that a number of modifications are necessary to ensure that the merger savings projected by the Applicants are translated into lower wholesale rates as quickly as possible. Accordingly, we are making our approval of the merger expressly contingent upon the filing of three distinct rate applications by Pacificorp Oregon.

The first filing shall be made no later than June 1, 1989, and shall include:

1) functionalized test period cost of service information on a total company basis and development of a single system requirements rate and a single system firm wheeling rate;

2) explanation and cost support (including all workpapers) for the allocation of total company revenues and expenses to the UP&L Division and the PP&L Division;

3) A UP&L Division rate filing in accordance with 18 C.F.R. § 35.13 including full Period I and Period II cost of service statements to support proposed requirements rates and proposed firm wheeling rates to become effective on June 1, 1989;

4) A PP&L Division rate filing in accordance with 18 C.F.R. § 35.13 including Period I and Period II cost of service statements to support proposed requirements rates and

---

<u>220</u>/ Trial staff Initial Brief at 54-74; Trial staff Reply Brief at 13-20.

proposed firm wheeling rates to become effective on June 1, 1989; 221/

5) A proposal to either (a) continue the single system fuel adjustment clause (effective upon Pacificorp Oregon's succession to UP&L's rate schedules) and extend its applicability to the PP&L Division wholesale customers or (b) eliminate the fuel adjustment clause altogether i.e., build all such costs into base rates; and

6) A plan for phasing out divisional pricing over a reasonable period of time.

Pacificorp Oregon shall utilize the same test periods for all of the filings discussed above. We recognize that this type of simultaneous cost of service presentation will involve a substantial filing burden for the new company. However, we feel that this process is necessary for the Commission to intelligently evaluate the inter-divisional cost allocation process and will help ensure that Pacificorp neither under-recovers nor over-recovers the cost of providing wholesale service.

The total company filing will provide a "shadow rate" which will enable the Commission to track the difference between divisional pricing and single system pricing, to identify the degree to which one division may be "subsidizing" the operations of the other division, and to evaluate the reasonableness of the time period proposed to phase in single system pricing. A single system rate will also provide a good benchmark against which retail jurisdictions may evaluate retail rate proposals by the merged entity. We wish to stress, however, that any allocation methodology that is adopted by the Commission for allocating costs between the two divisions will be without prejudice to contrary allocations or assignments of cost by retail regulatory commissions.

The second filing shall be made so as to become effective, subject to refund, on June 1, 1991. It shall be similar in format to the filing described above and shall include the development of a single system rate for comparison purposes, a UP&L Division rate change application, and a PP&L Division rate change application. Again, the same test period must be used to support each application as well as the single system comparison rate.

221/ Pacificorp Oregon may propose rates for either division that are designed to recover less than the fully allocated cost of service. This will enable Pacificorp Oregon to "freeze" PP&L rates at their current level so long as those rates can be cost-justified.

The third filing shall be made so as to become effective, subject to refund, on June 1, 1993. It is hoped that the merged entity will be fully integrated by this date and that the proposed rate will be a single system rate. However, if divisional pricing is to be continued beyond June 1, 1993, this filing shall be in the same format required for the first two filings. Pacificorp Oregon is free to make other rate change applications within the first five years of merged operations, but we will require any such filings to be made for both divisions simultaneously.

All divisional rate applications filed by Pacificorp Oregon within the first five years after the merger shall be made under section 205. Pacificorp Oregon must refund the difference between the rate that is accepted for filing and the rate that is ultimately determined to be just and reasonable back to the effective date of each rate application filed within the first five years after the merger. Our intention is to ensure, to the extent possible, that the cost of service filings fully reflect the benefits and cost savings that the Applicants have projected for the first five years of merged operations. Refund obligations associated with any rate filings made after June 1, 1993 shall be in accordance with Commission regulations in effect at that time. However, so long as Pacificorp Oregon proposes divisional pricing, rate applications for each division shall be made simultaneously and shall be based upon the same twelve-month test period.

We find that absent such rate conditions, the instant merger would not be consistent with the public interest. We again note our ability to subsequently condition the merger, if necessary.

F. Noncontiguous Systems

CREDA argues that the proposed merger must be rejected as contrary to the general public policy against mergers of noninterconnected and noncontiguous systems. 222/ Citing Commonwealth and Western Light & Telephone, Co. (Western Light), CREDA argues that Commission precedent requires merging utilities to either interconnect or divest themselves of any noncontiguous portions of their systems. Thus, CREDA asserts that unless the Commission overrules its precedent on this subject, the Commission would at a minimum have to condition approval of this merger on a showing that PacifiCorp Oregon will either: (1) interconnect its Western System with its Eastern system and/or the UP&L system; or (2) divest the PP&L western system.

222/ CREDA Brief Opposing Exceptions at 77.

223/ 33 FPC 1147 (1965).

The cases cited by CREDA rely on the fact that the Federal Power Act (containing section 203) was enacted together with PUHCA as a single legislative bill. PUHCA prohibits mergers or acquisitions by holding companies that do not tend toward the economical and efficient development of an integrated public utility system. 224/ Citing the above legislative history and Western Light, the Commission stated in Commonwealth:

> [W]e believe that the basic congressional policies as to integrated operation embedded in [PUHCA] are applicable considerations in passing upon proposals for merger of operating companies, and that the burden is upon the applicants to demonstrate why operation of noncontiguous electric territories or combined gas and electric facilities is consistent with the public interest. 225/

For the reasons set forth below, we overrule Commonwealth and Western Light to the extent that they may be interpreted as requiring the parties to a merger to either physically interconnect their noncontiguous systems or to divest themselves of those systems. The requirements of PUHCA, including the prohibition against mergers that do not meet the definition of an integrated public utility system, apply only to public utility holding companies. Neither CREDA, nor the Commission in Commonwealth and Western adequately distinguish between operating electric utilities that are part of a holding company system and those that are not. This distinction is a crucial one, for it was the holding company 'device' that was the target of PUHCA.

PUHCA was enacted in 1935 in response to widespread abuses among utility holding companies. 226/ These abuses resulted in

---

224/ 15 U.S.C. § 79(a)(29)(A) (1982). See n. 80, supra.

225/ 36 F.P.C. at 943.

226/ In a message to Congress on March 12, 1935, President Roosevelt addressed the legislation being considered by Congress to remedy the abuses of the utility holding companies. The President stated:

> Except where it is absolutely necessary to the continued functioning of a geographically integrated operating utility system, the utility holding company with its present powers must go. If we could remake our

(continued...)

the loss of millions of dollars to the investing public. 227/ By its terms, PUHCA is limited in its application to public-utility holding companies and their affiliates. The concern that the

---

> 226/(...continued)
> financial history in light of experience, certainly we would have none of this holding-company business. It is a device which does not belong to our American traditions of law and business. . . . [I]t offers too well-demonstrated temptation to and facility for abuse to be tolerated as a recognized business institution. That temptation and that facility are inherent in its very nature. S. Rep. No. 621, 74th Cong., 1st Sess. at 3 (1935), (setting forth the text of the President's message sent to Congress on March 12, 1935, transmitting a report on public-utility holding companies prepared by the National Power Policy Committee).

227/ In a statement to Congress in 1982, the precarious financial position of the holding companies prior to the enactment of PUHCA was summarized by the Chairman of the Securities and Exchange Commission:

> As a result of the highly-leveraged capital structures, small percentage increases in the earnings of the underlying operating companies were phenomenally magnified at the level of the top holding company's most junior equity securities. . . . Of course, this leverage also worked in reverse so that even the relatively small decreases in earnings of the operating companies during the early 1930's had a significant impact on the top-heavy structure of holding company debt and preferred securities. . . .
>
> The investing public suffered losses of millions of dollars. The complex capital structures of these holding company systems, together with the lack of uniform accounting standards, also afforded many opportunities to direct profits or losses through intercompany channels. Public Utility Holding Company Act Amendments, Hearings on S.1869, S.1871 and S.1977 before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 97th Cong. 2d Sess. 369-370 (1982).

holding company device be abolished, "except where it is absolutely necessary to the continued functioning of a geographically integrated operating utility system", is embodied in section 11(b)(1) of PUHCA, 228/ which requires the simplification of holding company systems by limiting them to a single integrated public-utility system. Similarly, section 10(c)(2) prohibits mergers or acquisitions with or by a holding company if such acquisition does not tend toward the economical and efficient development of an integrated public-utility system. 229/

Relying on Commonwealth and Western Light, CREDA insists that the Commission apply a strict "interconnect or divest" rule to this merger. Thus, they are arguing that the single integrated public utility system concept as set forth in PUHCA is fundamental to our analysis of whether a merger not involving a holding company is consistent with the public interest pursuant to section 203 of the FPA. Implicit in this argument is the assumption that the difference between a holding company system and an operating company is one of mere formality, and not one of substance.

However, as noted, PUHCA specifically targeted the holding company device and the evils attendant thereto. In fact, Congress recognized a clear distinction between a holding company and an operating company, and expressly contemplated that various operating units could be merged into a single operating company so long as it did not employ the holding company device. "All the advantages of large-scale operation and centralized financing claimed for present-day holding companies can be obtained when a holding company holds a single integrated system of operating companies or when a number of operating units are merged into the legal unit of a single large operating company." 230/

Accordingly, we need not determine whether a proposed merger will result in an "integrated public utility system" as defined in PUHCA. Similarly, we need not apply a strict rule requiring either the interconnection or divestiture of noncontiguous systems. While we recognize that the extent to which the systems will be integrated is relevant to our inquiry under section 203, our focus under the FPA is more appropriately upon the merged

---

228/ 15 U.S.C. § 79k(b)(1) (1982).

229/ 15 U.S.C. § 79j(c)(2) (1982).

230/ S. Rep. No. 621, 74th Cong., 1st Sess. at 12 (emphasis added).

entity's ability to provide economical and reliable service to the public. 231/

As noted, the FPA was enacted together with PUHCA. While PUHCA required that holding companies be dismembered and reconstituted along regional lines, one of the Commission's responsibilities under the FPA is to oversee the realignment of electric utility operating companies following the breakup of the holding companies. 232/ The Senate Report on the Public Utility Act of 1935 states: "This section [203] . . . complements title I of the bill [PUHCA] by directing the [Commission] to prevent transfers or consolidations of property which would impair the ability of public utilities to render adequate service. . . ." 233/

231/ As we stated in the order setting this matter for hearing, "we will permit the parties to address the issue of whether the merged companies will be capable of being operated economically and efficiently as a single entity. We will also set for hearing the issue of the impact on the public interest of the merged entity not operating as a single entity to the extent such is found to be the case." 41 FERC at 61,755. We adopted the same approach in the order setting for hearing the merger application in Tucson Electric Power Co., et al., 44 FERC ¶ 61,441 (1988).

232/ In testimony before Congress, the Commission's Solicitor - one of the drafters of the legislation that was to become the Federal Power Act - stated:

> [T]he provision . . . with reference to consolidation is very important when considered in connection with title I [PUHCA] of this bill. . . . To have legislation of this kind enacted at the same time legislation of the character carried in title I is enacted is important, because whatever form title I takes, there is going to be a realignment in this industry and steps should be taken now to protect the public against an uneconomic realignment. Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives (House Hearings), p. 250 (emphasis added).

233/ S. Report No. 621, 74th Cong. 1st Sess. p. 50 (1935) (emphasis added). Similarly, the Commission's Solicitor stated:

(continued...)

Section 202 of the FPA provides, inter alia, that "[f]or the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources", the Commission is to encourage the voluntary interconnection and coordination of facilities in the public interest. 234/ Similarly, the Commission is given the authority under section 203(b) to grant approval of proposed mergers and consolidations upon terms and conditions that it finds "necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities" that are subject to its jurisdiction.

Thus, it is apparent that the appropriate focus under section 203 is on whether a proposed merger will impair the ability of the utility to render adequate service, and on whether it will result in an uneconomic realignment of electric operating facilities. The degree to which the merged entity will be comprised of interconnected and contiguous systems is relevant to the extent that it bears on the ability of the merged entity to capture economies of scale and to provide economical and reliable service. As the Commission recognized in Commonwealth, "[t]he touchstone of successful operation in today's electric power industry is the coordination of operating facilities to achieve the full economies of scale made possible by advancing technology." 235/

In this case, the Applicants accept the judge's finding that PP&L's two separate systems (its Western and Eastern systems) are not physically interconnected and that PP&L relies on contract rights to operate on a single utility basis. 236/ Similarly, they acknowledge that UP&L's system is not interconnected with

---

233/(...continued)

> The Commission is given . . . the duty of attempting to bring these systems into district and integrated systems, the purpose being to provide the best and cheapest service that can be provided for the public. . . . [I]f that is to be accomplished, then, this Commission must have certain jurisdiction over facilities and jurisdiction over acquisition of property, and jurisdiction over securities. House Hearings, p. 501 (emphasis added).

234/ 16 U.S.C. § 824a(a) (1982).

235/ 36 FPC 927, 930 (emphasis added).

236/ Applicants Brief on Exceptions at 81.

PP&L's Western system; that there is no evidence that such systems will become physically interconnected after the merger; and that the merged entity's combined electric systems would constitute 19 integrated service areas separated by transmission constraints. 237/ The Applicants argue, however, that these facts are irrelevant to a determination of whether the merged company will operate economically and reliably as a single utility. We disagree, and find that these facts are relevant to our analysis. However, as discussed below, we nonetheless find that the merger will enhance the ability of the Applicants to operate economically and reliably, and will result in an entity capable of being operated as a single, coordinated system.

Because of the geographic diversity of PP&L's service territory, operational control of PP&L's present system is maintained through its two coordinated control areas. 238/ Nonetheless, PP&L operates and plans its generation and transmission resources on a single coordinated system basis. 239/ After the merger, the merged company's generation and transmission resources will also be planned and operated on a single-utility basis, thus permitting it to dispatch its most economic generating units. 240/

UP&L is presently interconnected to PP&L's Eastern system at Naughton, Wyoming. 241/ The Applicants plan to ultimately raise the transfer capacity between UP&L and PP&L to approximately 530 MW and to construct other transmission facilities in order to eliminate transmission limitations east of PP&L's Jim Bridger plant and to permit access to lower-cost sources of power. 242/

Moreover, PP&L's 1980 Transmission Services Agreement (TSA) with Idaho Power provides for the transmission of up to 1600 MW of PP&L's Wyoming generation through Idaho Power's system in an

---

237/ Id.

238/ Ex. 8 at 4, 6-7; Tr. at 2035.

239/ Ex. 8 at 4-5.

240/ Ex. 8 at 28-30. The Applicants maintain that the merger will create an even more integrated system that will operate in an interconnected and coordinated fashion. They also suggest that the merger will result in an integrated public utility system as defined in PUHCA. However, as discussed above, we need not make such a determination.

241/ Ex. 9, Sch. 3 at 4.

242/ Ex. 8 at 33-35.

east to west direction to PP&L's energy deficient Western system. CREDA argues that these contract rights are not equivalent to interconnection since the TSA does not permit transfers from west to east. 243/ However, the merged company will not require such transfers since Western loads exceed Western generation. 244/ While it is conceivable that west to east transfers may become necessary, the Applicants state that they are willing to construct a transmission line bypassing Idaho Power's system if the Commission determines one is necessary.

Thus, we find that the merger will enhance the ability of UP&L and PP&L to operate economically and reliably, and will result in an entity capable of being operated as a single, coordinated system. 245/ We will, however, retain continuing jurisdiction over the issue of whether it will be necessary at some time in the future for the Applicants to construct a transmission line bypassing Idaho Power's system in order to continue operating economically and reliably as a single, coordinated system.

243/ CREDA Brief Opposing Exceptions at 78-9. CREDA also argues that the TSA does not permit transfers of power from sources other than PP&L's own generation. Id. However, we find that this does not represent a significant limitation. Moreover, if it proves to be a significant limitation in the future, we are retaining jurisdiction, as discussed below, to order the Applicants to construct a transmission line to alleviate this restraint.

244/ Ex. 207 at 47.

245/ The Applicants have indicated that they are willing to commit that capacity curtailments to interruptible customers will not increase in frequency or duration over historical levels, regardless of the merged company's level of firm, off-system sales. Tr. 2681-83. While the Applicants are unwilling to make a similar commitment with regard to economic curtailments, Tr. 3334, there has been no showing that an increase in the frequency or duration of such curtailments is likely to result from the merger, or that an increase in such curtailments would adversely affect the overall reliability of the merged company. We note that interruptible customers will retain whatever contract rights after the merger as existed before the merger, as well as whatever remedies are available pursuant to state retail rate regulation.

The Commission orders:

(A) The Joint Application for Authorization for a Merger filed October 5, 1987 is hereby granted subject to the terms and conditions set forth in the body of this order.

(B) Within 60 days of the issuance of this order the Applicants shall make a compliance filing with the Commission, including a statement either accepting or rejecting the terms and conditions set forth above. However, if any request for rehearing is pending at the expiration of the 60-day period, the filing shall be made within 15 days of the date the Commission disposes of the request[s] for rehearing. If within the aforementioned period no compliance filing has been made, Commission approval shall be deemed denied.

(C) Docket No. EC88-2-000 is hereby terminated.

By the Commission.

(S E A L)

Lois R Cashell
Lois D. Cashell,
Secretary.

APPENDIX A

REVISED WHEELING POLICY
PROPOSED BY STAFF

Following is the wheeling policy (Policy) of PacifiCorp (Company), and its operating divisions, Pacific Power & Light Company and Utah Power & Light Company (Utah Power).

I. DEFINITIONS

As used herein, the following terms shall have the following meanings:

1. "Embedded Costs" means the actual fixed and variable costs associated with transmission facilities calculated in accordance with established Federal Energy Regulatory Commission (FERC) regulations.

2. "Firm Wheeling" means the contractual obligation to stand ready to transmit power and energy up to a specified amount for a specified term, subject to such interruptions as are agreed to between the contracting parties to maintain system reliability.

3. "Integrated Service Area" means a geographic area of the Company's system within which it is generally unconstrained in its ability to respond to requests to transmit power in the quantities that can be reasonably expected.

4. "Non-Firm Wheeling" means transmission service that is interruptible at the sole discretion of the Company, or interruptible for any reason other than system reliability, as agreed to between the contracting parties.

5. "Opportunity Costs" of a wheeling transaction means the economic benefits to the Company and its customers of alternative uses of transmission facilities which must be foregone to make the transaction.

6. "Point of Delivery" means the point at which power wheeled by the Company is received by another utility.

7. "Point of Replacement" means the point at which the Company takes delivery of power to be wheeled for another utility.

8. "Source" means the Mona Substation or any facility that generates electricity that is located within an Integrated Service Area.

9. "Transmission Dependent Utilities" means those Utilities that are dependent on the Company for transmission access to their loads or resources, and includes Deseret Generation and Transmission Co-operative, Utah Associated Municipal Power Systems, Inc. and its present members, and the present members of the Utah Municipal Power Association.

10. "Utility" means any public or private entity that is lawfully engaged in the business of selling electricity at wholesale or retail.

II. EXISTING CONTRACTS

All transmission contracts to which Utah Power or Pacific Power & Light Company were parties as of the effective date of this Policy shall be honored by the Company for their remaining term.

III. FIRM WHEELING WITHIN AN INTEGRATED SERVICE AREA

When both the Source and Point of Delivery are within one of its Integrated Service Areas, the Company will provide Firm Wheeling service for a requesting Utility as a matter of course unless the amount of power to be wheeled exceeds the engineering limitations of the Company's system.

The rate for Firm Wheeling service provided pursuant to this Part III will be designed to recover an allocated portion of either system embedded cost or an allocated portion of the embedded cost of the facilities used to provide the requested service. The party requesting service shall not be required to agree, as a condition for receiving service, to the Company's method of allocating such costs.

To the extent that additions to the Company's transmission facilities are necessary to provide Firm Wheeling within an Integrated Service Area, and are technically feasible, the Company will construct such additions if sufficient lead time is provided and a contract term is agreed upon that is adequate to economically support the facilities required.

IV. FIRM WHEELING SERVICE INTO, OUT OF, OR THROUGH AN INTEGRATED SERVICE AREA

A. Determination of Ability to Provide Service.

When either or both the Point of Replacement or Delivery are not internal to a single Integrated Service Area, the Company will provide Firm Wheeling service to a requesting Utility unless the Company determines that provision of the requested service would impair its ability to render firm service to native load customers, would preclude its ability to meet obligations under previously executed wheeling and bulk power contracts, or would otherwise be impractical or impermissible for reasons beyond the Company's control. This determination will be based upon a reasonable, case-specific evaluation of the following factors only:

1. The duration of the requested service;
2. Whether new facilities would have to be constructed in

order to provide the requested service over the Company's facilities;

3. Whether other Utilities desire the same transmission services;

4. Whether the provisions of transmission contracts with other Utilities permit the requested service;

5. Whether the intentions of the Utility requesting service are lawful (for example would there be a violation of laws related to a certificated area);

6. The degree of firmness of the requested service;

7. The service priority of the requested service;

8. The system impacts of the requested service;

9. To the extent the requested service involves the control area of another Utility, whether that other Utility will cooperate in providing the service;

10. Whether the Utility requesting the service is a scheduling Utility;

11. Current laws and regulations as they apply to the Company and its competitors.

B. Rates for Service.

The rates for Firm Wheeling service provided pursuant to Paragraph IV.A. will be designed to recover an allocated portion of embedded system costs, together with Opportunity Costs, if any, incurred as a result of providing the service. The

Opportunity Cost rate component will be based upon the following principles:

1. The Company may base its quantification of Opportunity Costs on the incremental changes to the Company's costs and revenues caused by commitment of Company transmission facilities to the provision of Firm Wheeling service.
2. The Company's quantification of Opportunity Costs will not include lost benefits associated with the loss of the sale of firm power by the Company that is displaced by the power being transferred pursuant to this Policy.
3. The amount by which the Opportunity Cost based rate exceeds the underlying Embedded Cost based rate shall not exceed the unit cost of eliminating the transmission capacity constraint or constraints giving rise to the Opportunity Costs, giving due regard to the estimated present value of costs and revenues associated with such additional capacity. As part of this rate development process, the Company will examine the technical feasibility and public interest benefits of constructing transmission capacity in lieu of proposing an Opportunity Cost based rate.
4. At the option of the Utility requesting the service, exercised at the time of entering into a contract,

Opportunity Costs will be based upon either projected or experienced operating conditions and wholesale marketing opportunities.

C. Regulatory Approvals.

If the Utility requesting wheeling service agrees in principle to the appropriateness of including an Opportunity Cost component in the Firm Wheeling rate, but the Company and the Utility requesting service are unable to reach agreement as to the appropriate level or methodology of such a component, the Company shall provide the requested service and unilaterally file a proposed rate including an Opportunity Cost component with the FERC, subject to refund.

D. Reciprocity.

A Utility requesting firm wheeling service under this part may not unreasonably deny the Company comparable service over comparable facilities controlled by the requesting Utility.

E. Other Restrictions

The Company shall not withhold transmission capacity in order to effect a purchase and resale of bulk power for which firm transmission is requested.

V. USE OF FACILITIES CHARGES

To the extent that providing Firm Wheeling services requires the installation of facilities that are not generally useful to the Company in providing transmission services, the Company may require the payment of a use of facilities charge or contribution in aid of construction to recover costs associated with the installation of such facilities.

VI. ANCILLARY SERVICES

To the extent a request for Firm Wheeling service requires the provision of generating reserves by the Company, or load following services, which the Company is able to provide, or if transmission losses are not otherwise provided, the Company will attempt to negotiate an appropriate charge for such ancillary services with the requesting Utility. If the parties are unable to agree on an appropriate charge, the services will be provided and the Company will unilaterally file a proposed charge with the FERC, subject to refund.

VII. REQUESTS FOR SERVICE AND FOR INFORMATION

Requests for Firm Wheeling service should be made in writing to the Company. The Company will respond to written requests for wheeling services in writing in a reasonable period of time. In cases where the Company is not prepared to provide the requested service, an explanation of the factors underlying the Company's decision will be provided.

The Company will promptly respond to reasonable oral and written requests by Utilities for information concerning the price and availability of Firm and Non-Firm wheeling services. Based on the requesting Utility's representations as to the nature of the services required, the Company will make a good faith effort to accurately estimate such price and capacity information for the use of potential transmission service customers; however, such estimates do not constitute a binding commitment as to price or availability of service.

VIII. PARTICIPATION BY OTHER UTILITIES IN TRANSMISSION CONSTRUCTION

A. With respect to the construction of transmission facilities of voltage levels of 345 kV or higher and subject to applicable state regulatory approval, the Company will afford other Utilities the opportunity to participate in the project, provided that: (a) the potential participants have a legitimate interest or service-related purpose in such participation, (b) the joint participation will not unreasonably delay the project or render it impractical for the Company as a matter of economics or engineering, (c) the potential participants are prepared to equitably share in the costs and benefits of the project, considering the cost of the project, the value of the Company's existing investment in related facilities and the benefits to be derived by each party, and (d) the Utility requesting the opportunity to participate has not unreasonably denied the Company's participation in comparable projects.

B. With respect to Transmission Dependent Utilities, the Company will agree to joint participation in upgrades, improvements or additions to backbone transmission (138 kV or higher), interconnections and substation facilities that are internal to an Integrated Service Area, so that such Utilities may, subject to applicable state regulatory approval, reasonably participate in the project, provided that: (a) the potential participants have a legitimate interest or service-related purpose in such participation, (b) the joint participation will not unreasonably delay the project or render it impractical for the Company as a matter of economics or engineering and (c) the potential participants are prepared to equitably share in the costs and benefits of the project considering the cost of the project, the value of the Company's existing investment in related facilities and the benefits to be derived by each party.

C. With respect to Transmission Dependent Utilities, the Company shall not unreasonably withhold its consent to requests for upgrades, improvements or additions to interconnections, transmission and substation facilities located within an Integrated Service Area, and subject to applicable state regulatory approval, provided that: (a) the requesting Utility arbiter whose decision will be subject, where required, to review by the FERC as an uncontested offer of settlement.

D. State Jurisdiction.

This Paragraph IX shall not apply to Paragraph VIII to the extent that a state agency has jurisdiction over complaints arising from the Company's alleged failure to adhere to the provisions of Paragraph VIII.

X. NON-FIRM WHEELING

A. General.

To the extent it has physical capability to do so, the Company will provide Non-Firm Wheeling to signatories of the Western Systems Power Pool Agreement or the Intercompany Pool Agreement in accordance with the terms of those agreements. In addition, the Company will negotiate separate contracts with Utilities for Non-Firm Wheeling which provide for an equitable sharing of benefits between the Company and other Utilities participating in the transactions.

B. Rates Based on a Three Way Sharing of Benefits.

The following principles accomplish an equitable sharing of benefits acceptable to the Company.

1. The rates for Non-Firm Wheeling service under this paragraph shall be designed to approximate, to the extent feasible, an equal three-way sharing of the savings among the

selling, buying, and wheeling parties, with total savings calculated based on the difference between the seller's incremental cost and the buyer's decremental cost.

2. Each party to this rate shall agree to make available to the other parties such incremental cost information as is reasonably necessary to estimate the total savings to be shared.

XI. WHEELING FOR QUALIFYING FACILITIES

The Company will provide transmission service for Qualifying Facilities to Utilities in accordance with provisions of 18 C.F.R. §292.303.

XII. INTEGRATED SERVICE AREAS

A listing of the Company's existing Integrated Service Areas is attached hereto. This list is subject to revision based upon subsequent changes to the physical capabilities and contractual limitations under which the Company operates its transmission system. Such revisions are subject to the requirements of Paragraph IX.C., Enforcement.

APPENDIX A

INTEGRATED SERVICE AREAS

1. The existing UP&L service area in the State of Utah;
2. The existing UP&L service area in the State of Idaho;
3. The existing UP&L service area in the State of Wyoming;
4. The existing PP&L service area in Southern Oregon and Northern California;
5. The existing PP&L Coos Bay, Oregon service area;
6. The existing PP&L Lincoln City, Oregon service area;
7. The existing PP&L Willamette Valley, Oregon service area;
8. The existing PP&L Central Oregon service area;
9. The existing PP&L Hood River, Oregon service area;
10. The existing PP&L Portland, Oregon service area;
11. The existing PP&L Clatsop, Oregon service area;
12. The existing PP&L Enterprise, Oregon service area;
13. The existing PP&L Pendleton, Oregon service area;
14. The existing PP&L Walla Walla, Washington service area;
15. The existing PP&L Yakima, Washington service area
16. The existing PP&L Sandpoint, Idaho service area;
17. The existing PP&L Libby, Montana service area;
18. The existing PP&L Kalispell, Montana service area; and
19. The existing PP&L service area in the State of Wyoming.